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IN THE

# Supreme Court of the United States

October Term, 1960.

No. 565

AMERICAN DREDGING COMPANY,

*Petitioner,*

*v.*

GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY and HERMAN S. STOFFMAN and BENJAMIN STOFFMAN,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OCTOBER TERM, 1960

No.

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v.

GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY and HERMAN S. STOFFMAN and BENJAMIN STOFFMAN,
*Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner prays that this Honorable Court shall issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered September 16, 1960, upon Petition for Rehearing, amending the original opinion of the same Court filed April 21, 1960. The opinion of the United States District Court for the Eastern District of Pennsylvania is reported 175 F. Supp. 882 and at 1959 A. M. C. 2418. The opinion of the Court of Appeals is reported at 282 F. 2d 73 and at 1960 A. M. C. 1802.

## JURISDICTION.

The original opinion and judgment of the Court of Appeals was entered April 21, 1960. Pursuant to the rules of the Court of Appeals for the Third Circuit, a Petition for Rehearing was timely filed and the Judgment Sur Petition for Rehearing was entered September 13, 1960, at which time the opinion of April 21, 1960, was amended with opinion and dissenting opinion. The jurisdiction of this court is invoked under 28 U. S. C. § 1254.

## QUESTIONS PRESENTED.

In *Kernan v. American Dredging Company*, 355 U. S. 426, the judgment of this Court was that American was liable for death and injuries which had occurred when its tug was ignited by burning gasoline in the middle of the river. There were judgments and settlements of the claims against American and American filed a libel against Gulf Oil Corporation and other riparian owners to recover for the damage to its tug and the sums which it had paid as judgments and settlements in the death and injury cases.

The question presented is whether, in these circumstances, a libel by American against the alleged tortfeasors, who negligently deposited or permitted flammable material to be upon the surface of the river, *states a cause of action* for the sums paid to satisfy judgments and to settle the death and injury cases.

Statutes involved are the Merchant Marine Act, Jones Act, 46 U. S. C. § 688, and the Coast Guard Navigation Regulations, particularly 33 C. F. R. § 80.16(h).

## STATEMENT OF THE CASE.

After American had paid judgments and made settlements following this Court's decision in *Kernan v. American Dredging Company*, 355 U. S. 426, it filed its libel in

admiralty in the United States District Court for the Eastern District of Pennsylvania. All of the parties were residents of Pennsylvania. American's libel set out claims both for property damage and for indemnity for the sums it had paid in the death and injury cases. American joined other riparian owners in addition to Gulf Oil Corporation which was already a defendant in separate civil suits instituted by Kernan and others as the result of this same disaster.

Some of the respondents answered, others filed exceptions and ultimately all of the respondents, acting in concert, filed exceptions and sought dismissal of American's libel. The District Court dismissed it in its entirety. [Appendix 1a]. On appeal the Circuit Court first affirmed. [Appendix 7a].

American filed a Petition for Rehearing in the Court of Appeals for the Third Circuit and on petition and answer, without oral argument, the Court of Appeals amended its original opinion and judgment. [Appendix 8a]. It still dismissed so much of American's claim as sought indemnity for the sums paid in satisfaction of the death and injury claims. It reversed so much of the judgment of the District Court as had dismissed American's claim for the extensive damage it had sustained by reason of damage to its tug and loss of use thereof. It remanded this claim for property damage to the District Court for further proceedings. Chief Judge Biggs filed a dissenting opinion on the Petition for Rehearing. He agreed with the majority that American was entitled to proceed to trial to prove its property damage claim. He dissented upon the ground that American was also entitled to proceed to trial on its indemnity action and that its right to indemnity was not barred by rules of the general maritime law.

**Basis for Federal Jurisdiction.**

The jurisdiction of the Federal Court, sitting as a court of admiralty, was invoked upon the basis that the actionable facts had occurred upon navigable waters.

## BASIS FOR GRANTING THE WRIT.

### The Court of Appeals Has Misconstrued Prior Decisions of This Court.

The Courts below proceeded upon the basis that in *Kernan v. American Dredging Company* this Court had labeled American a tortfeasor as that term is usually understood and that since *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation*, 342 U. S. 282, had held that courts of admiralty and maritime jurisdiction would not fashion rules of *contribution* as between joint tortfeasors, the decision likewise barred American's claim for *indemnity*.

The Court of Appeals went further. It held, citing its own prior decision in *King v. Waterman S. S. Corporation v. Dugan & McNamara*, 272 F. 2d 823, Cert. granted March 28, 1960, which in turn relied upon its decisions in *Brown v. American-Hawaiian S. S. Co.*, 211 F. 2d 16 (C. A. 3), and *Crawford v. Pope & Talbot*, 206 F. 2d 784 (C. A. 3), that any claim for indemnity, in the maritime law at least, must be bottomed upon a contract, express or implied. Since American had no contractual relationship with the oil companies, riparian owners of the land adjacent to the river which American's tug was navigating at the time of the fire, no right of indemnity *could* arise in American and, even *without factual proof of any sort*, the libel alleging negligence of the riparian owners was nevertheless defective and subject to dismissal *in limine*. It nevertheless recognized the right of American to maintain the action to recover for the damage to its property.

American contends that this Court's decision in *Kernan v. American Dredging Company* did not hold that American was a tortfeasor *vis-à-vis* persons not within the purview of the Jones Act. American contends that this Court's decision in *Kernan* did not label it as some sort of a mad dog

upon whom negligent tortfeasors were free to perpetrate statutory violations (33 U. S. C. § 433; 33 U. S. C. § 407)[1] and acts of negligence with impunity.

American contends that in the *Kernan* case this Court did not overrule its own earlier decision in *The Eugene F. Moran v. New York C. & H. R. R. Co.*, 212 U. S. 466, and did not abrogate the principle of general tort law which "imposes liability for violation of the statutory duty only where the injury is one which the statute was designed to prevent". *Kernan v. American Dredging Company*, 355 U. S. at 432.

Of course, neither the F. E. L. A. nor the Jones Act govern the relationships of American *vis-à-vis* Gulf,[2] although they were the basis for this Court's holding that American was liable to Kernan. We emphasize that American was not a tortfeasor in the usual sense and that American's libel alleged that Gulf was a *tortfeasor in the usual sense* because it created the condition (gasoline on the surface of a navigable river) or failed to warn the passing tug of the presence of the dangerous material, for there was no prohibition against open lights, fires or other sources of ignition in the area.

The District Court relied upon this Court's decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation*, 342 U. S. 282, but that decision, we submit, does not control this case. This Court will recall that Certiorari was granted in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* to resolve the conflict which had arisen among intermediate Federal Courts which were attempting to fashion a rule of *contribution* where an injured plaintiff had recovered damages based upon alleged unsea-

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1. Making it unlawful for any person to discharge or permit the discharge of petroleum products upon navigable waters and making it unlawful to deposit refuse in navigable waters generally. (Reprinted in full, Appendix 14a.)

2. For simplicity we refer to all of the respondents collectively as "Gulf" because it is the first named of the respondents. There is no implication that Gulf is the actual or the only tortfeasor against whom American will produce evidence if permitted to proceed to trial.

worthiness of a ship owned by the defendant and *where the negligent third party defendant-employer was protected by Section 5 of the Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. § 905. When this Court decided *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* there were four divergent rules, fashioned by as many different Courts of Appeals. Compare *American Mutual Liability Insurance Company v. Matthews*, 182 F. 2d 322 (C. A. 2); *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181 (C. A. 9), *Hitaffer v. Argonne Co.*, 183 F. 2d 811 (C. A. D. of C.) and *Baccile v. Halcyon Lines*, 187 F. 2d 403 (C. A. 3).

In *Halcyon* it was argued that the rule the Third Circuit had fashioned was not a practical one under the Longshoremen's and Harbor Workers' Compensation Act, however apt it might be under Pennsylvania's Compensation Act. Cf. *Maio v. Fahs*, 339 Pa. 180 (1940). See brief for respondent in this Court, No. 62, October Term 1951.

It is perfectly clear that this Court's decision in *Halcyon* was not intended to be applied blindly to all situations. This Court made it clear that it was not enunciating a rule as to all contribution in all maritime cases and subsequent decisions in *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corporation*, 350 U. S. 124, *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, and *Crumady v. Joachim Hendrik Fisser*, 358 U. S. 423, demonstrate this.

This Court's decision in *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corporation* makes it clear that where the prospective indemnitor is an employer subject to the Longshoremen's and Harbor Workers' Compensation Act, the employer *may contract away* the benefits conferred upon him under the Act. This Court said, 350 U. S. 124 at 133:

> "Because respondent in the instant case relies entirely upon petitioner's contractual obligation, we do not meet the question of a noncontractual right of indemnity . . . ."

Later this Court said:

> ". . . in the area of *contractual indemnity* an application of theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate." [Emphasis ours] *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563 at 569.

We suggest that in *Halcyon* this Court did not say there could be no indemnity in the absence of a contract. Rather it held that a noncontractual right of contribution could not stand in the face of the exclusive liability provision of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act.

The dissenting opinion below points out that noncontractual indemnity is recognized in the maritime law in a proper situation. *Standard Oil Co. v. Robins Dry Dock & Repair Co.*, 32 F. 2d 182 (C. A. 2), and *Petition of L. Boyer's Sons Co.*, 25 F. 2d 602 (C. A. 2). In the *Standard Oil* case:

> "The complaint was founded on the primary obligation of the Robins Dry Dock & Repair Company, that had furnished the gangway and had invited the plaintiff's employees to use it, to keep such gangway in a safe condition."

The Court said:

> "We can see no real distinction between the legal principles involved in this case and in Washington Gaslight Co. v. Dist. of Columbia, 161 U. S. 316, 16 S. Ct. 564, 40 L. Ed. 712, Geo. A. Fuller Co. v. Otis Elevator Co., 245 U. S. 489, 38 S. Ct. 180, 62 L. Ed. 422, and Petition of L. Boyer's Sons Co. (C. C. A.) 25 F. (2d) 602. In all three of those cases a third party had recovered against a person who was under a nondelegable duty to furnish a safe place to such third person, but in each case the primary and affirmative wrong was occasioned by the defendant against which indemnity was sought." 32 F. 2d 182 at 183.

This Court has recognized non-contractual indemnity in non-maritime cases. *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316; *George A. Fuller Co. v. Otis Elevator Co.*, 245 U. S. 489.

We suggest that the fundamental error of both Courts below was in regarding *Halcyon* as controlling all situations of non-contractual indemnity [as well as contribution] and in failing to recognize that, whatever duty American may have breached to *its own employees* by reason of obligations imposed by the Jones Act, American is not a tortfeasor as to Gulf, which negligently deposited flammable petroleum products upon the surface of a navigable stream. Gulf owed a duty to refrain from negligent acts as to both American and American's employees working on its tug. American owed such a high duty of care in the circumstances of this case only to its own employees. Therefore, the rule should be that where, as between the parties to an indemnity action, both breached a duty owed to the alleged injured plaintiff, but prospective indemnitee (American) did not breach a duty owed to prospective indemnitor (Gulf), then indemnity should be allowed. See Hodges "Contribution and Indemnity Among Tortfeasors", 26 Tex. L. Rev. 150 at 162. See also Section 96, A. L. I. "Restatement of Restitution" and 37 Iowa L. Rev. 517 at 538.

We do not go so far as to say that this Court may not read into this case an implied contract that Gulf's tortfeasorship as to American requires that it indemnify American not only for the latter's direct loss of property but also for its indirect loss traceable to Gulf's dereliction or breach of implied contract. This would not be new law. Compare Collier on Bankruptcy, Second Edition, Section 63.13.

This Court has held what is and is not a proper situation for indemnity. In *Union Stockyards Company of Omaha v. Chicago, Burlington & Quincy Railroad*, 196 U. S. 217, this Court denied recovery for indemnity because the prospective indemnitor and the prospective indemnitee had both failed to make a proper inspection and discover a defect which

neither had created. This Court there held that both parties breached duties "of the same character". This Court then went on to point to the many instances where cases had been taken out of that rule and indemnity had been awarded.

> ". . . in order that the ultimate loss may be visited upon the principal wrongdoer, who is made to respond for all the damages, where one less culpable, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the one principally responsible for the injury done." 196 U. S. at 224.

This Court goes on to refer to cases involving municipalities held liable for defects in streets or sidewalks caused by negligence or active fault of adjacent property owners. It cites *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, and then states:

> ". . . The same principle has been recognized in the court of appeals of the state of New York in *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 897, the second proposition of the syllabus of the case being:
>
> 'Where, therefore, a person had been compelled, by the judgment of a court having jurisdiction, to pay damages caused by the negligence of another, which ought to have been paid by the wrongdoer, he may recover of the latter the amount so paid, unless he was a party to the wrong which caused the damage.'
>
> • • •
>
> 'When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other because both are equally culpable or *participes criminis*, and the damage results from their joint offense. This rule

> does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such case the parties are not in *pari delicto* as to each other though, as to third persons, either may be held liable.'" 196 U. S. at 225, 226.

If both American and Gulf had negligently deposited flammable liquids on the surface of the river, American's position would be different. American violated a safety regulation intended *only* to prevent collision, for the regulation was aimed at protecting persons and property from injury as the result of collision at night. Gulf in its capacity as the operator of a large refinery, was not one of the class comprehended by the regulation and clearly the relationship between American and Gulf is not touched by the Jones Act.

The fundamental basis of the entire doctrine of indemnity is to prevent unjust enrichment. In this regard it is an interesting corollary that in the case of *Kernan, Administrator v. Gulf Oil Corporation*, Gulf filed a motion for summary judgment, basing it upon:

> ". . . the undisputed fact that in a companion proceeding in this Court, captioned 'In The Matter of the Petition of American Dredging Company', judgment was entered in favor of William Kernan, Administrator, said judgment was marked 'satisfied', that William Kernan is one and the same person as in the above case, the incident giving rise to the causes is the same and the causes of action asserted are the same or similar." [Civil Action No. 15908, U. S. D. C., E. D. Pa.]

It would be difficult to demonstrate a clearer case of the unjust enrichment of Gulf, the party which negligently permitted the flammable products to be deposited upon the surface of the river, creating "a trap for the unwary."

The Courts within the Third Circuit are of the view that there must be a contract between two parties before a right of indemnity can arise in one of them. That was clearly expressed in *Brown v. American Hawaiian S. S. Co.*, 211 F. 2d 16 at 18 where the Court said:

> "In answer to this suggestion [a right of indemnity exists under certain circumstances without a contractual relationship] we repeat what we thought had been made clear by the Crawford case: [Crawford v. Pope & Talbot, Inc., 206 F. 2d 784 (C. A. 3)] there can be no action of indemnity in these cases which is not based on the violation of some contractual duty."

The Court of Appeals followed that same reasoning in the single decision cited as authority in its opinion in the case at bar, *King v. Waterman S. S. Corporation v. Dugan & McNamara, Inc.*, 272 F. 2d 823, Cert. Granted 362 U. S. 926, argued October 20, 1960, No. 35.[3]

**American's Action Against Gulf May Be Maritime But It Is Local.**

Pennsylvania clearly recognizes indemnification in situations such as this. The need for uniformity in maritime law does not apply to this cause of action and Congress has not legislated in the field. Pennsylvania law should be permitted to fill the void.

The actionable facts in this case occurred upon the Schuylkill River, a stream wholly within the territorial limits of Pennsylvania and one which does not form any boundary between Pennsylvania and any other state. All of the parties are either Pennsylvania residents or are doing business upon land within the Commonwealth.

There can be no question but that Pennsylvania recognizes the right to indemnity.

> "Without multiplying instances, it is clear that the right of a person vicariously or secondarily liable for a

3. Reversed November 21, 1960 (29 L. W. 4035) while this petition was in page proof.

tort to recover from one primarily liable has been universally recognized."

• • •

"There is, of course, a fundamental difference between indemnity and contribution. The right of *indemnity* rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in *degrees* of negligence or on any doctrine of *comparative* negligence,—a doctrine which, indeed, is not recognized by the common law (see *Fidelity & Casualty Co. of New York v. Federal Express, Inc.*, 136 F. 2d 35, 40). It depends on a difference in the *character* or *kind* of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person." *Builders Supply Co. v. McCabe*, 366 Pa. 322, 327-28, 325-26 (1951).

It is clear that in Pennsylvania the right of indemnification does not derive from contract, although it is equally clear that a contract relation could have been resorted to by the Pennsylvania Court in developing the right. *Pennsylvania R. Co. v. Sun Oil Co.*, 383 Pa. 537 (1956). It is clear that Pennsylvania applies Section 96 of the A. L. I. Restatement of Restitution.

Whatever the present validity of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, we need not remind the Court of the series of recent holdings committing to the States wide scope in regulating and creating rights and liabilities upon the inland seas, and permitting their enforcement in Federal Courts.

*Romero v. International Terminal Operating Co.*, 358 U. S. 354;
*Hess v. United States*, 361 U. S. 314;
*M/V Tungus v. Skovgaard*, 358 U. S. 588;
*Caldarola v. Eckert*, 332 U. S. 155;
*Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U. S. 310;
*Maryland Casualty Co. v. Cushing*, 347 U. S. 409;
*Just v. Chambers*, 312 U. S. 383;
*Skiriotes v. Florida*, 313 U. S. 69 at 75;
*Toomer v. Witsell*, 334 U. S. 385 at 393.

"Maritime Law is not a monistic system". Where activities are "maritime", but so closely related or connected to the pervasive need for state regulation, *and* State Law neither impairs nor destroys essential uniformity *or* a declared congressional purpose, state power is recognized in admiralty courts.

The whole thrust of Gulf's defense is to label American a tortfeasor [*Kernan v. American Dredging*] and invoke the rule of *Halcyon Lines v. Haenn, supra.* In so doing, Gulf is referring to acts occurring wholly within the boundaries of Pennsylvania, a state which recognizes and enforces a non-contractual right of indemnity in the absence of willful, active or primary fault. *Builders Supply Co. v. McCabe*, 366 Pa. 322; *Pennsylvania R. Co. v. Sun Oil Co.*, 383 Pa. 537.

Speaking through its highest court, Pennsylvania has declared it to be against *its* Public Policy that a primary, active wrongdoer should escape the consequences of his wrongful act solely because an injured plaintiff may have elected to recover his damages from another also legally liable, although less culpable in the sense that his wrongs were neither active nor primary. Nothing about Pennsylvania's Public Policy conflicts with Federal legislation. The Jones Act, which was held to spell out American's liability to its employees, did not attempt to regulate those outside the employer-employee relationship. In *Erie R. Co. v. Tompkins*, 304 U. S. 64, this Court recognized that federal law is incomplete and interstitial in many instances and

that state law plays an important if not a basic role in supplementing and completing national law and federal regulatory programs. See Mishkin, "The Variousness of 'Federal Law' ", 105 U. of Pa. L. Rev. 797.

The Courts below failed to recognize that, in view of this Court's decisions in *Romero, Tungus, Wilburn Boat* and *Hess*, and other cases, uniformity is not essential in all situations and state law is competent where the situation is "maritime but local".

**The Questions Presented Are of Far-Reaching Importance.**

This is peculiarly the type of case which this Court should review. It presents an important question of maritime law, *i.e.*, whether a right of indemnity can exist in the absence of contract. Review by this Court is necessary to determine the full scope of the meaning of this Court's decisions in *Kernan v. American Dredging Company* and *Halcyon Lines v. Haenn*. Surely the rule of liability in Jones Act and F. E. L. A. cases will frequently be in issue where an employer seeks to obtain indemnity from an actively negligent tortfeasor. The Court of Appeals has, as the dissent by Judge Biggs points out, misconstrued prior decisions of this Court and has unduly and, we submit, improperly limited the scope of actions for indemnity in the maritime law. It is in a small proportion of cases that a contract will exist between a Jones Act employer and the tortfeasor whose active negligence injures his servant. The importance of the question in the field of maritime law cannot be overestimated.

## CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Court should issue a Writ of Certiorari and should review the judgment of the Courts below.

Respectfully submitted,

T. E. Byrne, Jr.,
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*Counsel for Petitioner.*

# APPENDIX A.

## OPINION OF THE DISTRICT COURT.

Filed July 22, 1959

By HASTIE, *Circuit Judge* (sitting by special designation).

This libel as instituted by American Dredging Co. demands of certain riparian landowners contribution or indemnity for damages libellant has had to pay for the wrongful death of a seaman employed by it. The fatal accident occurred in Pennsylvania waters when a volatile petroleum product on the surface of the Schuylkill River ignited as libellant's tug with a tow was navigating the stream. Libellant was held for the seaman's death in the ensuing fire on the theory that fumes from the oil which coated the river were ignited by an open flame kerosene lantern carried by the tow in a position which was only three feet above the surface of the river although the law required a light to be shown at an elevation of eight feet or more. Libellant alleges that respondents were at fault and should respond by way of contribution or indemnity because their negligence caused the volatile and inflammable substance to be present on the surface of the river.

The respondents have filed exceptions to the libel claiming that as a matter of law they have no duty to make libellant whole and thus that the libel does not state a cause of action.

At the outset it is necessary to examine the nature of libellant's liability which respondents are being asked to share. This inquiry is answered by the opinion of the Supreme Court in *Kernan v. American Dredging Co.*, 1958, 355 U. S. 426, directing, contrary to the decisions of the courts below, that American Dredging Co. respond in damages for the fatal accident then and now in question. In

the *Kernan* case all of the Justices agreed that this cause of action for the wrongful death of a seaman in navigable waters is a substantive right created solely by federal law, particularly the Jones Act, 41 STAT. 1007, 46 U. S. C. § 688. The majority of the Court then reasoned that it was enough to make the shipowner liable for the seaman's death that the igniting of inflammable vapor rising from the surface of the river was caused by the placement of a ship's light much closer to the water than navigation regulations permitted. It mattered not that this statutory fault was the violation of a duty imposed solely to make the light more easily seen and thus intended solely to protect against the hazards of collision. True the scope of liability for negligent injury, both at common law and in admiralty, is normally limited by the principle that the injured person has a cause of action only if his interest, as in fact invaded, lay within the risk of harm which in legal contemplation made the actor's conduct blameworthy. *The Eugene F. Moran*, 1909, 212 U. S. 466; RESTATEMENT, TORTS § 286; See *Seavey, Principles of Torts*, 1942, 56 HARV. LAW REV. 72, 90. But it is enough under the Jones Act that fault, whether the breach of a statutory duty or otherwise, on the part of an employer subject to the Act has caused harm to his employee. Or, as the Court put it in the *Kernan* case:

> "The FELA and the Jones Act impose upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer's fault. This fault may consist of a breach of the duty of care, analogous but by no means identical to the general common-law duty, or of a breach of some statutory duty." 355 U. S. at 432.

This rationale is spelled out because libellant argues at length that in the *Kernan* case the Supreme Court did not hold libellant to a tortfeasor's primary liability for harm caused by his wrong. The argument is ingenious but not sound. It is conceded that by common law standards

there was no negligence on the part of libellant. But this is true only because the accident caused was not within the risk which made libellant's conduct wrongful. The fact remains that the liability which has been imposed under the Jones Act is a liability for harm caused by the actor's wrong. In legal contemplation such an actor is held as a tortfeasor even though he has been denied the benefit of certain traditional limitations on the area and scope of liability.

It is now necessary to examine the respondents' situation in relation to the fatal injury for which libellant has had to respond in damages. This libel asserts, and at the present stage we must accept its assertion, that negligence of the respondents caused the dangerous accumulation of volatile and inflammable materials on the surface of the river. The great risk inherent in such a condition materialized in the fatal catastrophe which occurred here. Thus, the respondents also may be liable as tortfeasors for the fatal injury of libellant's employee.

The foregoing analysis of the nature of the claims involved is relevant to the question whether, as libellant contends, the law of Pennsylvania may and should be utilized as the source of the rights of contribution and indemnity which libellant asserts. It has already been pointed out that the obligation which libellant has satisfied and respondents are now asked to share has been defined and imposed by the Supreme Court in the *Kernan* case solely as a federally created right under the Jones Act. In these circumstances state law did not and could not play any part in imposing liability on libellant. By the same token attendant and incidental obligations in the nature of rights over against others are derived, if at all, from the same source. The entire complex of substantive rights thus arising in this maritime cause is a creation of national law. Compare *Pope & Talbot, Inc. v. Hawn*, 1953, 346 U. S. 406; *Garrett v. Moore-McCormack Co.*, 1942, 317 U. S. 239; *Chelentis v. Luckenbach S. S. Co.*, 1918, 247 U. S. 372. Our

inquiry then is whether national maritime law recognizes a right of contribution as an equitable incident of such Jones Act liability as we have here.[1]

As concerns the right of contribution for maritime wrongs the decisive case is *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 1952, 342 U. S. 282. There the Supreme Court reasoned that only in collision cases has the maritime law heretofore recognized a duty of contribution between parties who share legal responsibility for a maritime injury. The Court then considered whether it should feel free to fashion rules of contribution in a broader area of maritime wrongs. It was unwilling to do this because in the Jones Act, the Public Vessels Act, the Longshoremen's and Harbor Workers' Compensation Act and other statutes Congress has substituted a legislative scheme of liability for judge made law over a broad area. True the Longshoremen's and Harbor Workers' Compensation Act had special bearing on that case, but the Supreme Court gave no indication that its decision was limited to cases involving that statute. Rather, it was the stated view of the Court that in this area of statutory liability for maritime torts legislative action rather than judicial imposition should determine whether the incident of contribution is to be recognized and, if so, whether equally or by degree of fault among tortfeasors responsible for an injury.

The rationale of the *Halcyon* case is also fatal to libellant's suggestion that it would be proper here for the admiralty court to borrow a state contribution rule from the law of Pennsylvania. The considerations which keep admiralty courts from fashioning their own rules of contribu-

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1. While our attention has been directed to wrongful death actions permitted in the admiralty forum under state wrongful death statutes, those cases are not relevant here. They involve enforcing state created rights and not the borrowing of concepts from state law in shaping substantive federal law. *The Tungus v. Skovgaard*, 1959, 358 U. S. 588. It is normal that state concepts be utilized in defining state created rights but not in the defining of federal rights.

tion, as applied in the *Halcyon* case, equally restrain admiralty from borrowing any state rule in similar circumstances. Indeed, such borrowing would be merely a particular way of doing that which the *Halcyon* case disapproves generally.

The libellant's claim to be indemnified by the respondents requires only brief discussion. Authoritative recent cases involving claims to be indemnified for liability imposed under the Jones Act and other maritime law consistently recognize that normally the right to indemnity depends upon the existence of a legal relationship—in most cases a contractual one—between indemnitor and indemnitee. *Crumady v. The J. H. Fisser*, 1959, 358 U. S. 423, *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 1958, 355 U. S. 563; *Hagans v. Farrell Lines, Inc.*, 3d Cir. 1956, 237 F. 2d 477; *Brown v. American-Hawaiian S. S. Co.*, 3d Cir. 1954, 211 F. 2d 16. These cases are binding upon this court.

Here the libellant shipowner and the several respondent riparian landowners are in fact and in legal contemplation total strangers. Each has been independently at fault. The unhappy conjunction of fault on the one side in causing oil to coat the river and on the other in placing a lighted lantern very near to the water caused the accident in suit. In such circumstances the court can find no relational basis and no legal justification for imposing an indemnitor's liability on the respondents after the libellant has paid damages for injury caused by the active and concurring wrongs of libellant and respondents. *Cf. Amerocean S. S. Co. v. Copp*, 9th Cir. 1957, 245 F. 2d 291. It is not necessary to reach the question, left open by the Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co.*, 1956, 350 U. S. 124, whether absent any relationship between those responsible for maritime torts, admiralty will employ concepts of "primary" or "active" fault as distinguished from "secondary" or "passive" fault as a basis for imposing an

obligation to indemnify.[2] For here the statutory wrong of libellant and the common law negligence of respondents were plainly concurring causes simultaneously active and effective in inflicting injury.

The exceptions to the libel will be sustained and the libel will be dismissed.

/s/ WILLIAM H. HASTIE,
*Circuit Judge.*

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2. How in legal theory this would differ from contribution is not clear.

## OPINION OF THE COURT OF APPEALS.

(Filed April 21, 1960)

PER CURIAM.

While appellant's flotilla of a tug and two scows was proceeding down the Schuylkill River, Pennsylvania, the river surface in the vicinity became ignited. As a result two of libellant's seamen lost their lives, two others were injured and the tug was damaged. In suits based on the deaths, appellant was held responsible. Thereafter it filed this libel against certain landowners along the river in the fire area, alleging their responsibility for the fire and seeking indemnity for its losses resulting therefrom.

The district court on exceptions to the libel dismissed it. In an exhaustive opinion, carefully following the law as it at present stands in this circuit,[1] the court could find no relational basis or legal justification for imposing an indemnitor's liability on the respondents in the circumstances of this case. We must agree.

The judgment of the district court will be affirmed.

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1. King v. Waterman SS Corporation v. Dugan & McNamara, Inc., 272 F. 2d 823 (3 Cir. 1959), cert. granted March 28, 1960

## ORDER OF THE COURT OF APPEALS SUR PETITION FOR REHEARING.

(Filed September 13, 1960)

The opinion of this court, filed April 21, 1960, will be amended by striking the last line thereof, reading: "The judgment of the district court will be affirmed" and adding the following:

"The argument in this case on exceptions to the libel covered just the deaths and personal injuries arising out of the accident above described and for which appellant had been held responsible. There was no attempted distinction suggested between the personal injury phase and the damage to appellant's tug. Indeed the latter was not even mentioned.

"It is true that in the libel filed January 6, 1953 (the accident involved occurred December 18, 1952) there is an allegation in the same paragraphs which assert the personal injury situation, of damage to the tug and loss of its use. However, the whole force of the presentation to the district court centered on the death claims which had been reduced to judgment and the personal injury claims which appellant had settled and paid. As a result the court decided only the controversy which had been argued to it.

"Appellant, on its petition for rehearing to this court, contends that the district court dealt with its property damage claim 'only sub silentio' and asserts that the property damage cause of action rests on grounds other than those which it based its suit for contribution or indemnification with respect to its alleged damages arising out of the personal injury and death claims.

"As we read the district court opinion we think it clear that, because of the manner in which the exceptions to the libel were argued, the questions in connection with

the property damage to the tug and loss of its use were never fairly presented to the trial court and never passed upon.

"The judgment of the district court will be affirmed as to its denial of contribution or indemnity to appellant by appellees arising out of the death and personal injury claims in this matter. As to the property damage to the tug and loss of its use claims, the judgment of the district court will be vacated and that part of the case remanded for proceedings as may be indicated, not inconsistent with this opinion."

The petition for rehearing will be denied.

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By Biggs, *Chief Judge*, concurring in part and dissenting in part.

American Dredging Company has stated two causes of action in its libel against Gulf Oil Corporation and other riparian landowners along the Schuylkill River at Philadelphia who will be referred to collectively hereinafter as "Gulf". American has claimed, first, damages for injuries to its tug and scow caused by a fire which resulted from the ignition by a marking light on American's barge of volatile petroleum products which were lying on the surface of the river, allegedly because of the manner in which Gulf operated its waterfront facilities. American, second, seeks to recover from Gulf monies paid by American in satisfaction of judgments rendered against it in favor of two seamen employed by American who died as a result of injuries incurred in the fire.

In Kernan v. American Dredging Co., 355 U. S. 426 (1958)[1], Milan's Administrator, Kernan, was permitted to recover against American by the Supreme Court "in the

1. Cf. In re Petition of American Dredging Co., 235 F. 2d 618 (3 Cir. 1956) and In re Petition of American Dredging Co., 141 F. Supp. 582 (E. D. Pa. 1956).

absence of any showing of negligence" because of a "defect or insufficiency of the flotilla's [the scow's] lighting equipment" due to a violation of the Coast Guard Regulation requiring the marking light on the scow to be at a height of no less than eight feet above the water.[2] The Supreme Court referring to principles of law determined by it to be applicable in cases arising under the Federal Employers' Liability Act and the Jones Act, applied those principles in the Kernan case and imposed liability on American because the death of the seaman arose from a breach of the Coast Guard Regulation even though the Regulation was not intended to prevent the kind of action which contributed to the seaman's injury and death. See *id. supra*, 355 U. S. pp. 430-437.

That American was held liable to the seaman's administrator for damages does not bar American's action against Gulf for the damage suffered by American's tug and scow because Gulf cannot acquire the benefits of the Jones Act which applies only to seamen. In short American's rights against Gulf with respect to the damage suffered by the tug and scow cannot be affected by the status accorded the seaman against American. This aspect of the case must be viewed as if no seamen had been injured. The court below, however, made no specific ruling on American's claim for direct damage to its tug and scow and apparently treated both of American's claims alike.[3] I there-

2. See 33 U. S. C. A. § 178; 33 CFR § 80.10(b). The title of the relevant subchapter reads: "Navigation Requirements for Certain Inland Waters." It provides: "Scows not otherwise provided for in this section on waters described in paragraph (a) of this section shall carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles."

3. Laches also was asserted as a defense by Gulf but this defense was not passed on by either this court or the court below.

fore concur in the view of this court that the case must be remanded to the court below for its determination of the issues presented by this phase of the case.

In respect to American's claim for indemnity or contribution from Gulf, it is conceded that the Coast Guard Regulation violated by American was designed only to prevent maritime collisions at night. American, therefore, cannot, at this, the pleading stage of the case at bar, be deemed to be a tortfeasor within the ordinary meaning of the term for there has been no showing of any prohibition of a fire or a light in the river area where the accident occurred or proof that American knew or should have known that the water had been covered with volatile petroleum products by Gulf. This point is made clearer if we assume, *arguendo*, that American's scow not only had the light on its deck two and one-half feet above the water but also had a marking light eight feet above the surface of the river as required by the Regulation. Under such circumstances the fire would have occurred despite the fact that the requirements of the Regulation had been met.

It follows that the Supreme Court accorded a special status to the deceased seaman under the two federal acts referred to. This status is analogous to that which he might have enjoyed had he been covered by a workmen's compensation act. If this were a workmen's compensation act case American would be entitled to recover over against Gulf, if the injured workman had a right of action against Gulf, U. S. Fidelity & Guaranty Co. v. Elam; 198 Tenn. 194, 278 S. W. 2d 693 (1955); and, by analogy, American should be accorded similar rights in this case. The maritime law, under circumstances similar to those alleged here, authorizes recovery over from one primarily liable. See Standard Oil Co. v. Robins Dry Dock and Repair Co., 32 F. 2d 182 (2 Cir. 1929), and Petition of L. Boyer's Sons Co., 25 F. 2d 602 (2 Cir. 1928).

Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282 (1952) is not relevant to these issues for in

that case the shipowner's negligence concurred with that of the shoreside contractor in causing injury to the contractor's employee.

For the reasons stated, I conclude that this phase of the case also should be remanded to the court below for trial of the issues presented.

For these reasons I must respectfully dissent from the refusal of the court to grant the petition for rehearing on the issue last referred to herein.

# APPENDIX B.

## Jones Act, 46 U. S. C. § 688.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in case of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

## 33 CFR § 80.16 (h).

Scows not otherwise provided for in this section on waters described in paragraph (a) of this section shall carry a white light at each end of each scow, except that when such scows are massed in tiers, two or more abreast, each of the outside scows shall carry a white light on its outer bow, and the outside scows in the last tier shall each carry, in addition, a white light on the outer part of the stern. The white light shall be carried not less than 8 feet above the surface of the water, and shall be so placed as to show an unbroken light all around the horizon, and shall be of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 5 miles.

**33 U. S. C. § 433.**

Except in case of emergency imperiling life or property, or unavoidable accident, collision, or stranding, and except as otherwise permitted by regulations prescribed by the Secretary as in sections 434-437 of this title authorized, it shall be unlawful for any person to discharge, or suffer, or permit the discharge of oil by any method, means, or manner into or upon the coastal navigable waters of the United States from any vessel using oil as fuel for the generation of propulsion power, or any vessel carrying or having oil thereon in excess of that necessary for its lubricating requirements and such as may be required under the laws of the United States and the rules and regulations prescribed thereunder. The Secretary is authorized and empowered to prescribe regulations permitting the discharge of oil from vessels in such quantities, under such conditions, and at such times and places as in his opinion will not be deleterious to health or sea food, or a menace to navigation, or dangerous to persons or property engaged in commerce on such waters, and for the loading, handling, and unloading of oil.

**33 U. S. C. § 407.**

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: . . . ”

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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1960.

## No. 565.

AMERICAN DREDGING COMPANY,

*Petitioner,*

*v.*

GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY and HERMAN S. STOFFMAN and BENJAMIN STOFFMAN,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

## BRIEF FOR RESPONDENT IN OPPOSITION.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 565.

AMERICAN DREDGING COMPANY,

*Petitioner,*

*v.*

GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY AND HERMAN S. STOFFMAN AND BENJAMIN STOFFMAN,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF IN OPPOSITION FOR RESPONDENT, THE ATLANTIC REFINING COMPANY.

### OPINIONS BELOW.

The opinion of the District Court is reported at 175 F. Sup. 882 and the original opinion of the Court of Appeals for the Third Circuit is reported at 282 F. 2d 73. The unreported amended opinion after denial of rehearing was filed September 13, 1960 (Petitioner's Appendix 8A-12A).

### JURISDICTION.

The jurisdiction of this Court to review the original and amended opinions of the Court of Appeals for the Third Circuit is provided by Sections 1254(1) and 2101(c) of Title 28 U. S. Code.

## QUESTION PRESENTED.

The only question presented is whether this libellant, as a joint tortfeasor who has already been held liable by this Court for personal injury and death claims, may in a non-collision case obtain under general maritime law (1) contribution from another tortfeasor or (2) indemnity from a complete stranger in the absence of any express or implied contractual relationship among any of the interests involved.

## STATEMENT OF THE CASE.

Petitioner's libel was filed on January 5, 1959 to recover by way of contribution and indemnity the personal injury and death claim payments as well as property damage sustained by its tug ARTHUR N. HERRON as a result of a fire which broke out on that tug on November 18, 1952 while it was towing alongside certain scows in the Schuylkill River, Philadelphia.

Petitioner's initial liability for the foregoing personal injury, death claims and tug damage was determined by this Court when its petition for exoneration and limitation of liability was denied (355 U. S. 426) reversing the Court of Appeals (235 F. 2d 618) and also reversing the District Court for the Eastern District of Pennsylvania (141 F. Sup. 582).

This respondent, among others, filed peremptory exceptions to petitioner's libel in this case on the ground that as a joint tortfeasor American Dredging Company is not entitled to contribution as a matter of general maritime law from another alleged joint tortfeasor and on the further ground that petitioner is not entitled to indemnity from any of the respondents named herein since there is no underlying express or implied contractual relationship among any of the interests involved out of which a right of indemnity could arise.

The District Court sustained the exceptions (Petitioner's Appendix A, 1a-6a). The Court of Appeals for the Third Circuit affirmed (Petitioner's Appendix 7A).

In the District Court briefs and oral arguments prior to American's Petition for Rehearing, the personal injury and death claims and the tug's damages were properly treated as a whole and without distinction. In the Circuit Court this respondent specifically opposed any contribution for the tug's damages.

As an afterthought following the decision of the Third Circuit, petitioner requested a rehearing which was denied. However, it resulted in an amended opinion of the Court of Appeals which in effect stated that its first opinion applied only to the personal injury and death claims and was not intended to include tug damage. The issue of the tug damage was remanded to the District Court, for further proceedings not inconsistent with its opinion, where respondents' exceptions will be heard again. The only dissent was filed by Chief Judge Biggs although he was not one of the members of the panel which heard the argument.

## ARGUMENT.

### I. NO CONFLICT EXISTS BETWEEN THE DECISION OF THE COURT BELOW AND PRIOR DECISIONS OF THIS COURT HOLDING THAT UNDER THE GENERAL MARITIME LAW ONE JOINT TORTFEASOR MAY NOT OBTAIN CONTRIBUTION FROM ANOTHER JOINT TORTFEASOR IN A NON-COLLISION CASE.

In both the District and Circuit Courts, this petitioner has been rearguing the decision of the Supreme Court of the United States in *Kernan v. American Dredging Co.*, 355 U. S. 426, 1958 on the issue of American's fault. In that case, this Court held petitioner liable to the personal injury and death claimants for its statutory failure to have the tug's lights properly placed.

Petitioner's argument that it can not be a tortfeasor for misplacing the lights was made at the first trial and on the succeeding appeals of the *Kernan* case and has also been repeatedly made in this litigation. But this contention is no basis for granting the Writ requested. The Court below correctly applied this Court's decision in the *Kernan* case that petitioner was "at fault" and, as a matter of general maritime law, this established its liability.

In the *Kernan* case this Court held:

> "The FELA and the Jones Act impose upon the employer the duty of paying damages when injury to the worker is caused, in whole or in part, by the employer's fault. This fault may consist of a breach of the duty of care, analogous but by no means identical to the general common-law duty, or a breach of some statutory duty." (p. 432)

It is no longer a matter for argument, and certainly no ground for Certiorari, that American is not at fault

merely because the regulation for the placing of lights upon which its liability was based may have been initially promulgated primarily to prevent collisions rather than fires. Petitioner's fault in the *Kernan* case resulted from a breach of its duty to maintain the ARTHUR N. HERRON in seaworthy condition and to avoid the creation of conditions dangerous to persons and property as well.

The Court below correctly concluded that petitioner's liability, based on a statutory fault, was determined in the *Kernan* case. Notwithstanding the *Kernan* decision, petitioner now seeks Certiorari to persuade this Court to allow contribution in admiralty among joint tortfeasors.

In the Courts below, petitioner argued that the oil companies were negligent on a Common Law basis. Now, for the first time, petitioner argues that respondents' alleged negligence was based on statutory violations. While these distinctions may appear ingenious, they are irrelevant to the actual question presented by American's present petition.

We deny that The Atlantic Refining Company contaminated the river. But if Atlantic owed a duty of care to the ARTHUR HERRON to avoid creating a dangerous condition, certainly the owners of the ARTHUR HERRON owed an equally important duty to the riparian owners not to operate an unseaworthy tug on the river and thus create a condition hazardous to persons and riparian property.

Petitioner's argument that American was not a tortfeasor in the usual sense and that Gulf or Atlantic were tortfeasors in the usual sense entirely overlooks its own allegations that a dangerous condition was allegedly created by the joint and concurrent tortious conduct of American and the respondent oil companies.

The EUGENE F. MORAN, 212 U. S. 466, cited by petitioner on Page 5 of the Petition, contributes nothing to clarify the question presented by its petition, but again is merely a reargument of the *Kernan* case.

The Court below correctly held that any attempt by one joint tortfeasor to obtain contribution in this, a non-collision case, from the other joint tortfeasor for damages sustained fell within the prohibition of *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282, 1952. This prohibition was correctly applied to petitioner's personal injury and death claim payments for which it seeks contribution and should have been applied to the tug's hull damages, as the Court below originally ruled.

In the *Halycon* case, a ship ceiler sued the vessel for injuries sustained and the latter impleaded the employer of the injured man to obtain contribution. This Court, in denying contribution between the vessel and the injured man's employer as joint tortfeasors held:

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases, but this Court has never expressly applied it to non-collision cases. (p. 284)
>
> • • •
>
> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action." (p. 285)

In following the *Halcyon* case, the United States Supreme Court denied a vessel owner any contribution from a negligent stevedore in *Pope & Talbot, Inc. v. Hawn et al.*, 346 U. S. 406. See also *Hartford Accident & Indemnity Co. v. Gulf Refining Co. et al.*, 230 F. 2d 346, 354 (C. A. 5).

The District Court in the instant case properly disposed of petitioner's contentions on pages 5 and 6 of its petition that the *Halcyon* case decision should not apply

here because no longshoreman's act was involved. There the Court pointed out that this Court's language in the *Halcyon* case was broad enough to go beyond the unduly restricted limitation urged by appellant. The District Court correctly held:

> "True the Longshoremen's and Harbor Workers' Compensation Act had special bearing on that case, but the Supreme Court gave no indication that its decision was limited to cases involving that statute. Rather, it was the stated view of the Court that in this area of statutory liability for maritime torts legislative action rather than judicial imposition should determine whether the incident of contribution is to be recognized and, if so, whether equally or by degree of fault among tortfeasors responsible for an injury." (Petitioner's App. 4a)

Petitioner's claim for contribution for the personal injury and death claim payments was properly denied under prior decisions of this Court.

## II. NO CONFLICT EXISTS BETWEEN THE DECISION OF THE COURT BELOW AND THE PRIOR DECISIONS OF THIS COURT WHICH HAVE CONSISTENTLY HELD THAT ONE PARTY IS NOT ENTITLED TO INDEMNITY FROM A COMPLETE STRANGER WHERE THERE IS NO UNDERLYING EXPRESS OR IMPLIED CONTRACTUAL RELATIONSHIP AMONG ANY OF THE INTERESTS INVOLVED.

There is no question that petitioner as a tug owner and the several respondent riparian land owners are in fact and in legal contemplation total strangers allegedly independently at fault. As the District Court properly pointed out, the alleged fault on the one hand is in "causing oil to coat the river" and on the other hand "in placing a lighted lantern very near to the water" (Petitioner's App. 5a).

The Court below correctly affirmed the District Court in applying the general maritime law to this maritime tort and properly held that there was no relational basis and no legal justification for imposing an indemnitor's liability on respondent (Petitioner's App. 5a). The wrongs of petitioner and the alleged negligence of respondent were plainly concurrent causes which were simultaneously active in allegedly inflicting injury.

This Court has recently held that a basic contractual relation must exist where indemnity is sought out of which the right to indemnity arises, although the absence of a formal contract between the indemnitor and indemnitee is not fatal to the indemnity cause of action.

In *Waterman Steamship Corporation v. Dugan & McNamara, Inc.*, No. 35, October Term, 1960, decided November 21, 1960, this Court clearly reaffirmed its position in *Crumady v. S. S. Fisser*, 358 U. S. 423, where it was held:

> "We think this case is governed by the principle announced in the *Ryan* case. The warranty which a stevedore owes when he goes aboard a vessel to perform services is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not. That is enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries. Restatement, Law of Contracts, Sec. 133. Moreover, as we said in the *Ryan* case, 'competency and safety of stowage are inescapable elements of the service undertaken.' 350 U. S. at 133." (p. 428)

See also *Wyerhaeuser S. S. Co. v. Nacirema Operating Co., Inc.*, 355 U. S. 563, 1958; *Brown v. American-Hawaiian S. S. Co.*, 211 F. 2d 16 (C. A. 3); *Read v. United States*, 201 F. 2d 758, 763 (C. A. 3).

The foregoing cases establish that a party seeking indemnity from another, all of whom are complete strangers with no underlying contractual relationship between any of them, is outside the scope of the right to indemnity.

The instant case involved the concurrent fault of two persons having no contractual or other special relationship with each other nor with any other interest involved. This does not establish a case for indemnity of one of those wrongdoers against the other under the foregoing decisions of this Court.

Petitioner apparently relies on a statement in the case of *Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.*, 350 U. S. 124, 133, as set forth on pages 6 and 7 of its petition contending that this Court has not decided whether any non-contractual right of indemnity exists. This contention overlooks the principles of the *Crumady* and *Waterman* cases.

In an effort to prove a non-contractual right of indemnity, Petitioner erroneously relies on *Standard Oil v. Robins Dry Dock & Repair Co.*, 32 F. 2d 182 (C. A. 2) and *Petition of L. Boyer's Sons Co.*, 25 F. 2d 602 (C. A. 2). The right of indemnity in both of those cases arose out of an express contract which is specifically referred to in each opinion.

Petitioner's reference to *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, entirely overlooks the fact that the gas company's liability to indemnify the District of Columbia arose out of the duties and powers in the District's charter to the company (see page 325).

*George A. Fuller Co. v. Otis Elevator Co.*, 245 U. S. 489 cited on page 8 of petitioner's brief is no support to petitioner's argument for indemnity here. In that case the issue of Fuller's right to indemnity arose out of Otis' agreement with the o r of the building whose employee's negligence caused tl njury. Fuller had a contract with the building's owner. Even in *Pennsylvania Railroad Co. v. Sun Oil Co.*, 383 Pa. 537, 542, cited on page 12 of petitioner's brief, indemnity was denied; there was an absence of any relation between the parties on which a contract of indemnity could be shown or implied.

In the Court below, petitioner attempted to establish that the riparian land owners were more negligent than was

petitioner as the owner of an unseaworthy tug. That effort was unsuccessful since petitioner was placed in the awkward position of attempting to persuade the Court that the violation of a statutory duty as to proper lights, was less serious than the alleged negligence of respondent's Common Law duty of ordinary care. The Court below was well aware of this Court's determination that the HERRON's liability for all injuries and deaths resulted from a fire ignited by the tug's lights which were located in violation of a Coast Guard regulation for the safety of personnel and property and that this breach of a statutory duty was held to be the approximate cause of the fire. 355 U. S. 426, 431.

In the ARTHUR N. HERRON, *supra*, p. 427, this Court fully considered the heavy duty imposed on employers in the railroad and shipping industries to provide adequately for the safety of their employees while on the job.

The basic reason for statutory liability is that the duty involved is regarded as of such great importance to the public as to warrant absolute liability for its breach regardless of the extreme care used by the tortfeasor. This is negligence *per se*.

In *Urie v. Thompson*, 337 U. S. 163, 189, the Court said:

> "In this view the Safety Appliance Act, together with the Boiler Inspection Act, are substantively if not in form amendments to the Federal Employers' Liability Act. They dispense, for the purposes of employees' suits, with the necessity of proving that violations of the safety statutes constitute negligence; and making proof of such violations is effective to show negligence as a matter of law." (p. 189)

Also, in *Brady v. Terminal Railroad Association*, 303 U. S. 10, 15, the Court stated:

> "The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute

one and the carrier is not excused by any showing of care, however assiduous." (p. 15)

This philosophy, based on the statutory culpability of such a breach, is well settled. See *O'Donnell v. Elgin J. & E. R. Co.*, 338 U. S. 384, 390-391; *Moore v. C. & Or. Co.*, 291 U. S. 205; *San Antonio & Arkansas Pass. Ry. Co. v. Wagner*, 241 U. S. 476, 484.

On the application of the foregoing rule, American is not less culpable than Atlantic or the other oil companies, but may well be more so.

Petitioner's argument for the application of the State Law of Pennsylvania is entirely misconceived and was rightly rejected below.

Admiralty borrows from state law only when it has no applicable rule, and not as here, where a well recognized rule enunciated by the Supreme Court exists.

The Court below was correct in holding that it would be improper for the admiralty court to borrow a state contribution rule from Pennsylvania. As the Court below properly ruled:

> "The considerations which keep admiralty courts from fashioning their own rules of contribution, as applied in the *Halcyon* case, equally restrain admiralty from borrowing any state rule in similar circumstances. Indeed, such borrowing would be merely a particular way of doing that which the *Halcyon* case disapproves generally." (Appellant's App. 28a)

Furthermore, it is well settled that the general maritime law and not the local state law must be applied to all substantive issues involved in a maritime controversy, regardless of whether the forum is a court of admiralty, a state court under the "saving clause" of Section 9 of the Judiciary Act of 1789, 1 Stat. 76 (1789), as amended, 28 U. S. C. 1333 (Supp. 1951), or a federal court with diversity jurisdiction. *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372, 382, 1918; *Carlisle Packing Co. v. Sandanger*, 259 U. S.

255, 259, 1922; *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 244-245; *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 88-89 (footnote 5); 1 Benedict, Admiralty, 53-55 (6th Ed. 1940).

Accordingly, if this suit were pending in a Pennsylvania State Court, that Court would be obliged to refuse contribution among joint tortfeasors, notwithstanding a state statute providing for such contribution.

While the issue presented here was once of far reaching importance when it was first considered by this Court, the rule has long since become well established. This petition presents no novel question of importance requiring the attention of this Court.

Inasmuch as the Court below has ruled that the District Court never passed on the question of the tug's damages and remanded that question to the District Court, no final consideration of that issue has yet been made below. Accordingly, it is premature for this Court to consider the application of the rules of contribution and indemnity to any phase of this case until all the items of petitioner's alleged damages are before it.

## CONCLUSION.

For the reasons stated in the opinion below, the decree of the Court below insofar as it relates to personal injury and death claims should be affirmed.

Respectfully submitted,

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JAN 4 1961
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# Supreme Court of the United States

OCTOBER TERM, 1960.

No. 565.

AMERICAN DREDGING COMPANY,

*Petitioner,*

*against*

GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY, and HERMAN S. STOFFMAN and BENJAMIN STOFFMAN,

*Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

## BRIEF FOR RESPONDENT, ESSO STANDARD OIL COMPANY, SUED HEREIN AS STANDARD OIL COMPANY, IN OPPOSITION.

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OCTOBER TERM, 1960.

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Respondents.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

## BRIEF FOR RESPONDENT, ESSO STANDARD OIL COMPANY, SUED HEREIN AS STANDARD OIL COMPANY, IN OPPOSITION.

### QUESTIONS PRESENTED.

1. In the absence of a conflict of decisions and petitioner's failure to demonstrate that the question presented is of great importance to the public as distinguished from the parties, has not the petitioner failed to sustain its burden of establishing a basis upon which to grant certiorari?

2. Where a question has been partially decided and partially remanded by a Circuit Court of Appeals is it not premature for this Court to review the matter until such

time as the complete question can be presented for its consideration?

## Statement.

American Dredging Company commenced suit in the United States District Court for the Eastern District of Pennsylvania alleging a right to contribution and indemnity from this respondent and various other riparian land owners along the Schuylkill River. Exceptions were filed to American's libel and came on to be heard on April 30, 1959 before Judge Hastie who sustained the exceptions and dismissed the libel on July 22, 1959. Thereafter American appealed to the Third Circuit Court of Appeals which court after oral argument and submission of briefs affirmed the District Court's opinion. American then petitioned the Circuit Court for reargument and without oral argument the petition was denied but the Court of Appeals amended its former opinion so as to affirm the District Court's opinion in so far as American's claim for contribution or indemnity for personal injury and death claims paid but remanded the question of American's claim for property damage to its tug and loss of use. Subsequently on December 6, 1960 American petitioned this Court for a writ of certiorari.

## Reasons for Denying the Writ.

1. The sole reason that petitioner offers for granting its petition for writ of certiorari is that the questions presented are of far-reaching importance, and to this point petitioner has alloted merely one paragraph of its brief (p. 14). The remainder of petitioner's brief is a reargument of issues which have already been considered on three separate occasions. It has been consistently held that certiorari was not intended to give the party defeated in the

court below another hearing, *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163. We submit that the several questions presented by the instant case have been previously considered and passed upon by this Court and the lower courts in this case have uniformly adhered to the established law.

American alleges at page 14 of its brief that "review by this Court is necessary to determine the full scope of the meaning of this Court's decision in *Kernan* v. *American Dredging Company* (355 U. S. 426) and *Halcyon Lines* v. *Haenn* (342 U. S. 282)", but fails to present any support for its conclusion. We are not here concerned with the Jones Act or the Federal Employers' Liability Act as American urges, but merely with liabilities between alleged joint-tortfeasors who are legal strangers. This relationship has been explored by this Court in the *Halcyon* case, *supra*, and the law enunciated therein has been applied herein by the lower courts.

American attempts to lend authority to its argument by citing the dissent of Judge Biggs to the Third Circuit's opinion on American's petition for rehearing. With all due respect to Judge Biggs it must be pointed out that he took no part in the original argument on the several questions presented. The original bench which had the benefit of considering the issues at the time the matter was first presented to the Circuit Court and of reading all briefs and hearing all oral arguments, unanimously concurred in its opinion which is clearly in accord with existing law.

Petitioner has already received two appellate reviews and offers no worthwhile reason for the granting of this petition. Having failed to cite any conflict between the decision in the instant case and those in allied cases petitioner implicitly recognizes that the present case has not upset the uniformity of decisions on the point in question, and no amount of strained semantics can convert this matter into one warranting review by this Court on certiorari.

We therefore submit that having failed to sustain its burden of establishing a basis upon which certiorari can be granted American's petition should be denied.

2. American has erroneously alleged at page 4 of its brief that the Circuit Court recognized its right to maintain an action to recover for the damage to its property. As is clear from its opinion, page 8a of petitioner's brief, the Circuit Court held that the trial court never passed upon the question of damages to American's tug and her loss of use, and remanded that question to the District Court for further proceedings. Respondent's exceptions to petitioner's libel have therefore still not been decided but are to be further considered by the trial court.

We submit that until such time as the exceptions herein have been completely decided, it would be premature for this Court to consider the matter. Regardless who is successful before the District Court when further proceedings are had, that decision will be an inseparable part of the question now being urged by petitioner on this Court for its decision, and the two matters should not be considered piecemeal.

## Conclusion.

For the foregoing reasons it is respectfully submitted that American's petition for Writ of Certiorari should be denied.

Respectfully submitted,

Raymond T. Greene,
Counsel for Respondent, Esso Standard Oil Company.

Daniel T. Sweeney,
*Of Counsel.*

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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1960.

No. 565.

AMERICAN DREDGING COMPANY,
*Petitioner,*

*v.*

GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY and HERMAN S. STOFFMAN and BENJAMIN STOFFMAN,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

# Supreme Court of the United States.

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*Petitioner,*

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*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Respondent, Gulf Oil Corporation, respectfully prays that the petition for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Third Circuit entered on September 16, 1960, be denied.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

---

### SUMMARY OF ARGUMENT.

1. Petitioner has failed to comply with Rules 23-1(c) and 23-4, so its Petition should be denied.

a. Petitioner's "Question Presented" is not a proper formulation of the issue or issues involved in this action and gives no guidance to the Court as to what question or questions Petitioner seeks to have reviewed.

b. The Petition does not set out the points requiring consideration clearly or concisely.

2. The holding of the Court of Appeals does not conflict with any decision of this Court and does not rest on a misconstruction of any such decision.

3. The most unusual circumstances of this accident make it sui generis, with the result that whether or not Petitioner has a cause of action is not an important federal question.

## ARGUMENT.

### I. PETITIONER HAS FAILED TO COMPLY WITH RULES 23-1(c) AND 23-4, SO ITS PETITION SHOULD BE DENIED.

#### A. Petitioner's "Questions Presented" Is Not a Proper Formulation of the Issue or Issues Involved in This Action and Gives No Guidance to the Court as to What Question or Questions Petitioner Seeks to Have Reviewed.

Rule 23-1(c) of the Revised Rules of the Supreme Court of the United States requires that a Petition for Writ of Certiorari set forth the questions presented for review. The purpose of this is to define and isolate the significant decisive issues which are involved in the particular action so that this Court may exercise its Certiorari discretion in a wise and fully informed fashion.

When the mandatory, appellate jurisdiction of this Court with respect to review of federal decisions was narrowed and the discretionary, certiorari jurisdiction broadened by the Judges Bill of 1925, 28 U. S. C. § 1254 (1948), 43 Stat. 936 (1925), the purpose was to free this Court to decide, where appeal did not lie, only questions of considerable national significance. If this Court is not informed with conciseness and accuracy of the question presented by a particular case, it cannot properly exercise its discretion. Needless to say it is not the responsibility of this Court to study the Petition and decide itself what issues may be presented. On the contrary, this responsibility rests firmly on the Petitioner.

Moreover, this Court has repeatedly stated that once having granted Certiorari, it will not consider questions

which have not been raised in the Petition. See, e.g., *Local 1976, United Bhd of Carpenters, AFL v. NLRB*, 357 U. S. 93, 96 (1958), *Irvine v. California*, 347 U. S. 128, 129-30 (1954) and *National Licorice Co. v. NLRB*, 309 U. S. 350, 357 (1940). This is but a further example of the firm and sound policy to require litigants to state clearly and precisely what issues they wish to have reviewed.

Turning to the Petition in this action, Petitioner states only that the question presented is whether or not it has a cause of action against respondents under the circumstances. There is no formulation of the legal issues which may be determinative of this question. This Court must therefore turn to the lengthy argument and attempt to ferret out the issues. Gulf contends this is improper and is sufficient reason, by itself, to withhold the Writ.

**B. The Petition Does Not Set Out the Points Requiring Consideration Clearly or Concisely.**

As has been demonstrated above, Petitioner's "Questions Presented" are inadequate. In addition to this and undoubtedly as a result of it, the Petition as a whole does not clearly set out or identify the points requiring consideration by this Court. At one point the issue is stated as being whether Petitioner has a cause of action. See page 2 of the Petition. At another point, it is stated that the sole question is whether in the maritime law, a right of indemnity can exist in the absence of contract. See page 14 of the Petition. The thrust of that part of the Petition running from page 4 through page 11 seems to be that in the maritime law such a right of indemnity exists. But Petitioner states in the first paragraph of that part of his brief running from page 11 to page 14 that there is a void in the maritime law in this area which should be "filled" by Pennsylvania law. The latter statement indicates that Petitioner is not relying on his argument that the federal maritime law gives him a cause of action. In short, it is not possible to ascertain with any degree of certainty what the issues

are which Petitioner seeks to have reviewed. As we have stated above, it is not the responsibility of this Court to ferret out the issues. A fortiori, it is not its responsibility to guess what the issues are which the Petitioner wishes to rely on. Since the Petition does not present the points requiring consideration clearly and with brevity, it is violative of Rule 23-4. Consequently the Writ should be denied.

## II. THE HOLDING OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT AND DOES NOT REST ON A MISCONSTRUCTION OF ANY SUCH DECISION.

The principal reason advanced by Petitioner why Certiorari should be granted, is that the Court of Appeals misconstrued prior decisions of this Court. Before demonstrating that the holdings of the Court below on the questions before this Court were not in conflict with and do not rest in misconstruction of any decision of this Court, it is necessary to isolate the question or questions which are presented here and the holdings with respect to them.

First of all, as Petitioner correctly states, its claim for damage to its tug is not before this Court. Finding that it had not been presented to the District Court and therefore was not passed on by it, the Court of Appeals remanded this aspect of the action for further proceedings. *American Dredging Co. v. Gulf Oil Corp.*, 282 F. 2d 73 (3d Cir. 1960). This issue is not ready for review because neither Court below passed on it.

Nor is the question of Petitioner's right to contribution from Respondents before this Court. Petitioner has dropped this claim, evidently conceding the soundness of the reasoning of the lower courts. See that section of the Petition entitled, "The Questions Presented Are of Far-Reaching Importance", at page 14.

Thus the single aspect of this action with respect to which Certiorari is sought is as follows: Under maritime

law, is a shipowner whose fault was a concurrent contributing cause of the death of one of its seamen barred from getting full indemnity, for payments made in satisfaction of its Jones Act liability to its seaman, from a riparian landowner whose alleged negligence was also a concurrent contributing cause of the death? With respect to this issue, the Court of Appeals adopted per curiam the opinion of Circuit Judge Hastie who was sitting as the District Court in this case by special designation. *American Dredging Co. v. Gulf Oil Corp.*, 282 F. 2d 73 (3d Cir. 1960). Since the claim for contribution has been abandoned by Petitioner, only that part of Judge Hastie's decision which deals with the question of indemnity need be considered here.

First of all, Judge Hastie held that this issue must be decided in accordance with federal maritime law. Reasoning that since "the obligation which libellant has satisfied and respondents are now asked to share has been defined and imposed by the Supreme Court . . . . solely as a federally created right under the Jones Act," he decided that "the attendant and incidental obligations in the nature of rights against others are derived, if at all, from the same source." *American Dredging Co. v. Gulf Oil Corp.*, 175 F. Supp. 882, 885 (E. D. Pa. 1959).

Petitioner does not cite any decision of this Court which holds otherwise. Instead he restates the arguments made before and rejected by the lower courts to the effect that state law should be followed. It is not entirely clear whether Petitioner argues that state law should govern or whether the principles of state law should be incorporated into federal maritime law. Whichever it may be is not important because Judge Hastie was correct in his decision. In addition to the reasons given by him in his opinion, it should be pointed out that this Court held in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952), that the question of whether or not a shipowner could get contribution from the employer of a longshore-

man injured on its ship was governed by federal maritime law. Similarly, the question in the case at bar of whether or not a shipowner can get indemnity (which is nothing but one hundred per cent contribution) from a party whose fault combined with that of the shipowner to cause the death of one of the shipowner's seamen, is governed by federal maritime law. To have held otherwise, as Petitioner would have had the lower courts do, would be to have disrupted the uniformity of the maritime law and opened the door to defeating the policies established by Congress. In short, Judge Hastie's holding that maritime law governed Petitioner's right to indemnity did not conflict with any decision of this Court nor did it rest on a misconstruction of such a decision. Instead it was in strict logical and practical conformity with several such decisions.

With respect to the substantive issue before him, Judge Hastie held, citing *Crumady v. The J. H. Fisser*, 358 U. S. 423 (1959) and *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563 (1958), that "normally the right to indemnity in the maritime law depends upon the existence of a legal relationship—in most cases a contractual one—between indemnitor and indemnitee," *American Dredging Co. v. Gulf Oil Corp.*, 175 F. Supp. 882, 886 (E. D. Pa. 1959). Since Petitioner and Respondents were legally total strangers and no such relationship existed, Judge Hastie denied indemnity.

This holding is not in conflict with any decision of this Court. In fact, it deals with a question which was expressly left open in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124, 133 (1956). Moreover, the holding is consistent with and rests on a sound application of the principles set out in the *Ryan*, *Weyerhaeuser* and *Crumady* cases, and in *Waterman S. S. Corp. v. Dugan & McNamara, Inc.*, 81 S. Ct. 200 (1960). In each of these decisions, this Court was careful to emphasize that the basis for indemnity was the breach by the indemnitor of a contractual duty to the indemnitee. For instance, in

*Waterman* the stevedore had been engaged by the consignee of the cargo. When the shipowner sued for indemnity with respect to amounts paid to a longshoreman injured by the stevedore's negligence, this Court allowed recovery on the basis that the owner, as well as the ship, was a third party beneficiary of the stevedore's warranty of workmanlike service. Absent such an independent undertaking, there is no reason in justice why one defaulting party should be able to shift the entire loss to another defaulting party. Therefore, the logical implication of these four decisions is, as Judge Hastie held, that there is no right to indemnity in the absence of an established legal relationship.

There is one final point in Judge Hastie's opinion which must be mentioned because of the great weight placed on it by the Petitioner. Judge Hastie wrote:

> It is not necessary to reach the question, left open by the Supreme Court in *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co.*, 1956, 350 U. S. 124, whether absent any relationship between those responsible for maritime torts, admiralty will employ those concepts of "primary" or "active" fault as distinguished from "secondary" or "passive" fault as a basis for imposing an obligation to indemnity. For here the statutory wrong of libellant and the common law negligence of respondents were plainly concurring causes simultaneously active and effective in inflicting injury. *American Dredging Co. v. Gulf Oil Corp.*, 175 F. Supp. 882, 886 (E. D. Pa. 1959).

Petitioner's argument is apparently that this rests on a misconstruction of this Court's decision in *Kernan v. American Dredging Co.*, 355 U. S. 426 (1958). First of all, it is clear that this Court did not pass upon American Dredging Company's rights against third parties in that decision. Second, there is no language in that decision which would serve as authority for bringing the question

able doctrine of active and passive fault into the maritime law. But even if there were, Petitioner's fault here was as active and primary a cause of the fire here involved as was the swift kick of Mrs. O'Leary's cow of the Great Fire in Chicago in 1871. Once again, there has been no conflict with or misconstruction of prior decisions of this court in the decision of the lower court.

## III. THE MOST UNUSUAL CIRCUMSTANCES OF THIS ACCIDENT MAKE IT SUI GENERIS, WITH THE RESULT THAT WHETHER OR NOT PETITIONER HAS A CAUSE OF ACTION IS NOT AN IMPORTANT FEDERAL QUESTION.

The fire which gave rise to this action was caused, in Judge Hastie's words, by "the unhappy conjunction of fault on the one side in causing oil to coat the river and on the other in placing a lighted lantern very near to the water." There was no legal or contractual relationship between American Dredging Company and the Respondents. The only basis on which Petitioner seeks indemnity is that Respondents owned the riparian land opposite which the fire took place. Gulf contends that the questions presented by this case are so unusual and rare in occurrence that they do not warrant the time and thought of this Court pursuant to its Certiorari jurisdiction.

In almost all of the situations where the fault of a third party concurs with the fault of a shipowner to produce injuries to one of its seamen for which recovery is had under the Jones Act, there will be a contractual relationship establishing the obligations of the two wrongdoers. Whether the ship is alongside a pier, being fueled, loaded or unloaded, repaired or refitted, there is an agreement between the owner and the third party which sets out the rights and responsibilities of the two parties. For instance, in *Standard Oil Co. (N. J.) v. Robins Dry Dock & Repair Co.*, 32 F. 2d 182 (2d Cir. 1929), the defendant was

repairing the ship under a contract which provided that it would fully protect the vessel and the owners from claims for personal injury. See *Standard Oil Co. (N. J.) v. Robbins Dry Dock & Repair Co.*, 25 F. 2d 339 (S. D. N. Y. 1928). And in *Petition of L. Boyer's Sons Co.*, 25 F. 2d 602 (2d Cir. 1928), the court held that the prospective indemnitor had contracted to provide safe access to the lighter, and having failed to do so, was obliged to indemnify.

Furthermore, in the numerous cases which this Court has recently decided in this area such as *Ryan*, *Weyerhaeuser*, *Crumiady*, and *Waterman*, the contractual obligations of the indemnitor were the basis on which indemnity was imposed. Petitioner's failure to cite a single maritime case where there was not a contractual relationship between the prospective indemnitor and indemnitee is one more indication of the unique nature of the case at bar.

In short then, it is rare that the prospective indemnitor and indemnitee stand as total strangers. The question of whether Petitioner has a cause of action against Respondents under the most unusual circumstances of the present action, while of some importance to the parties, has no national significance and does not present an important federal question.

## CONCLUSION.

The Petition does not properly present the questions which Petitioner seeks to have reviewed, as required by Rule 23. The decision of the lower court does not conflict with or rest on a misconstruction of any decision of this Court. On the contrary it is logically and practically consistent with several recent decisions. Finally, the facts and circumstances of this accident are so unusual that the case does not present any important federal questions for review.

For the foregoing reasons, it is respectfully submitted the case does not merit review by this Court, and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMSON F. EDWARDS,
JOHN T. CLARY,
FRANCIS A. O'HARA,
JOHN B. HANNUM, 3RD,
JOHN C. KEENE,
*Proctors for Respondent Gulf Oil Corporation.*

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JAMES R. BROWNING, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1960

**No. 565.**

AMERICAN DREDGING COMPANY,

*Petitioner,*

*against*

GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY, and HERMAN S. STOFFMAN and BENJAMIN STOFFMAN,

*Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

## BRIEF FOR RESPONDENT, TEXACO, INC., SUED HEREIN AS TEXAS COMPANY, IN OPPOSITION.

JOSEPH M. BRUSH,
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# Supreme Court of the United States

OCTOBER TERM, 1960.

**No. 565.**

AMERICAN DREDGING COMPANY,

Petitioner,

*against*

GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY, and HERMAN S. STOFFMAN and BENJAMIN STOFFMAN,

Respondents.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

## BRIEF FOR RESPONDENT, TEXACO, INC., SUED HEREIN AS TEXAS COMPANY, IN OPPOSITION.

### Opinions Below.

The opinion of the District Court is reported at 175 F. Supp. 882, and the original opinion of the Court of Appeals for the Third Circuit is reported at 282 F. 2d 73. The unreported amended opinion after denial of rehearing was filed September 13, 1960 (Petitioner's Appendix 8a-12a).

## Jurisdiction.

The jurisdiction of this Court to review the original and amended opinions of the Court of Appeals for the Third Circuit is provided by Sections 1254(1) and 2101(c) of Title 28 U. S. Code.

## Questions Presented.

1. Whether the adjudication of petitioner's liability by this court in *Kernan* v. *American Dredging Company*, 355 U. S. 426 (1958) precludes it from claiming contribution and indemnity for its losses under the general maritime law from stranger riparian landowners who allegedly spilled the volatile substances that were ignited by the petitioner.

2. Whether the fact that the fire occurred on the Schuylkill River and all parties to the litigation are residents of Pennsylvania justifies an exception to the general maritime law on the ground that the matter is only of local concern.

## Statement.

On the night of November 18, 1952, as petitioner's tug *Arthur N. Herron*, with a dump scow in tow, alongside, was proceeding down the Schuylkill River in the vicinity of the Gulf Oil Dock and Refinery, Philadelphia, Pennsylvania, the surface of the river suddenly burst into flames that enveloped the tug and tow, set them afire, and resulted in damage thereto and the death and injury of certain crew members.

The petitioner, the owner of the tug and scow, filed a petition for exoneration or limitation of its liability with

respect to the injury and death claims. That proceeding resulted in its being held liable by this court in the opinion reported in *Kernan* v. *American Dredging Company*, 355 U. S. 426 (Feb. 1958).

Petitioner did not take any steps to recover for the damage to its tug and scow nor did it sue or attempt to implead the respondents in the proceedings involving the death and injury claims.

About one year after the decision of this court in the *Kernan* case, in January, 1959, the petitioner filed a libel in the Eastern District of Pennsylvania (Appendix A) against the respondents as "owners and occupiers of land" (libel Art. 14) along the Schuylkill River alleging that each of the respondents negligently permitted petroleum or other volatile products to be deposited on the surface of the river which were ignited (by petitioner) and caused damage alleged in the libel, Article 19 of which follows:

> "In addition to the damage to its tug, the loss of use thereof, the settlements it has made and the judgments which it has paid or which it may become liable to pay, the Libellant herein has paid and incurred large sums for investigation and defense of the claims which have been made against it by the persons injured on its tug and by the Administrators of the Estates of its two employes who were killed at the time of the said fire and who prosecuted claims against the Libellant under the Provisions of the Jones Act."

The respondents separately filed exceptions to the libel. The exceptions of this respondent are annexed (Appendix B). Exceptions of all respondents were argued the same day, and briefs were also submitted to the district court. On the argument and in the briefs no specific distinction or reference was made, as petitioner subsequently has done, to the different elements comprising its damage claim.

Judge Hastie, sitting in the district court by special designation, in an opinion reported in 175 F. Supp. 882 (also petitioner's Appendix 1a to 6a), correctly answered all of petitioner's arguments, reiterated in the Court of Appeals and in its petition to this court for certiorari, and dismissed the libel with the concluding observation that:

> "For here the statutory wrong of the libellant and the common law negligence of respondents were plainly concurring causes, simultaneously active and effective in inflicting injury."

The petitioner appealed and the decision of the district judge was affirmed by the U. S. Court of Appeals for the Third Circuit in a *per curiam* opinion reported at 282 F. 2d 73. Thereafter in a petition for rehearing of the case before the Court of Appeals *en banc*, the libellant repeated arguments previously made and emphasized that its claim for damage to its tug and scow had been overlooked by the district court and dismissed *sub silentio*.

The Court of Appeals denied the petition for rehearing but ordered an amendment of its prior opinion stating:

> "The argument in this case on exceptions to the libel covered just the deaths and personal injuries arising out of the accident above described and for which appellant has been held responsible. There was no attempted distinction suggested between the personal injury phase and damage to appellant's tug. Indeed the latter was not even mentioned.
>
> • • • • • •
>
> "As a result the court decided only the controversy which had been argued to it.
>
> • • • • • •
>
> "As we read the district court opinion we think it clear that, because of the manner in which the exceptions to the libel were argued, the questions in

connection with the property damage to the tug and loss of its use were never fairly presented to the trial court and never passed upon.

"The judgment of the district court will be affirmed as to its denial of contribution or indemnity to appellant by appellees arising out of the death and personal injury claims in this matter. As to the property damage to the tug and loss of its use claims, the judgment of the district court will be vacated and that part of the case remanded for proceedings as may be indicated, not inconsistent with th[illegible]nion." (Petitioner's Appendix 8a and 9a).

## Reasons for Denying the Writ.

The petitioner's statement that the questions presented are of far reaching importance is not supported by the petition or record. Repeating the argument made both in the district court and the Court of Appeals, the petitioner continues to contend that it is not a tortfeasor "in the usual sense" but that the respondents are tortfeasors "in the usual sense" (p. 5 of the petition), a distinction it is urged, that justifies an exception to the application of the general admiralty rule that there is no contribution between tortfeasors except in collision cases. *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corporation*, 342 U. S. 282 (1952).

The petitioner argues that although it might have been a tortfeasor as to its injured and deceased crew members, it was only a technical wrongdoer under the F. E. L. A. and Jones Acts. It urges further that neither act governs the relationships of American *vis à vis* Gulf and the other respondents, omitting any reference to the observation of the district court that the statutory wrong of the petitioner and the alleged negligence of the respondents were plainly

concurring causes of the fire that resulted in petitioner's damage.

In its libel petitioner alleged that the respondents negligently spilled oil or other volatile substances. As this court pointed out in its previous opinion (355 U. S. 426), the trial court found that the fire was ignited by an open flame kerosene lamp carried on the deck of petitioner's scow and that if the light had been carried as required by law the fire would not have occurred, 355 U. S. 426, 428.

Petitioner asserts that a review is necessary to determine the full scope of the meaning of this court's decisions in *Kernan* v. *American Dredging Company* and *Halcyon Lines* v. *Haenn* when what it really means is that it is unhappy with the import and application of the clear language of those decisions.

No conflict is shown to exist between the decision of the court below and prior decisions of this court.

In one breath the petitioner makes the statement that the matter is of far reaching importance in Maritime Law (p. 14) and in another (pp. 11, 12, 13) it asks for an exception in this case to the general maritime rule of *Halcyon* v. *Haenn* because the matter is only of local significance and it should have the benefit of an alleged more favorable Pennsylvania Rule.

The cases relied upon by petitioner involve contract relationships express or implied. In this case the petitioner and respondents are total strangers, alleged concurrent wrongdoers. The decisions below of both courts were therefore correct.

Finally it is submitted that the petition for certiorari is premature. The Court of Appeals has remanded to the district court that part of the case involving the claim for petitioner's property loss for clarification of its decision with respect to those items of damage. No separation or

distinction was made as to the various items of petitioner's damages. The exceptions were general (Appendix B), and the briefs and arguments made no point of special or separate rules as to the hull, injury or other elements of the damage as alleged in the libel. We are confident that the district court will clarify its opinion, if need be, when the respondents' exceptions are brought on for argument again. Until this confusion is settled and a specific ruling is made with respect to the property damage items we respectfully request that the application for certiorari be denied.

## Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted.

JOSEPH M. BRUSH,
Counsel for Respondent, Texaco, Inc.

## APPENDIX A.

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| AMERICAN DREDGING CO.,<br>*vs.*<br>GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY, and HERMAN S. STOFFMAN & BENJAMIN STOFFMAN, | No. 9 of 1959 in Admiralty |

### Libel.

The Libel of American Dredging Company against Gulf Oil Corporation, Standard Oil Company, Atlantic Pipe Line Company, American Oil Company, Texas Company, Atlantic Refining Co., Pioneer Oil Company and Herman S. Stoffman & Benjamin Stoffman, respectfully alleges, upon information and belief, as follows:

1. The Libellant is a corporation, organized and existing under the laws of the State of Pennsylvania and has its principal office and place of business at 12 S. 12th Street, Philadelphia.

2. Gulf Oil Corporation is a corporation having an office and place of business within this District. The Libellant avers, upon information and belief, that it is a corporation organized and existing under the laws of the State of Pennsylvania.

3. Standard Oil Company is a corporation having an office and place of business in this District. The Libellant

avers, upon information and belief, that it is a corporation organized and existing under the laws of the State of New Jersey.

4. Atlantic Pipe Line Company is a Corporation having an office and place of business within this District. The Libellant avers, upon information and belief, that it is a corporation organized and existing under the Laws of the State of Pennsylvania.

5. American Oil Company is a corporation having an office and place of business within this district and upon information and belief, the Libellant avers that it is organized under the Laws of the State of Maryland.

6. Herman S. Stoffman and Benjamin Stoffman are, upon information and belief, partners trading as Pioneer Oil Company and have an office and place of business within this district.

7. The Texas Company is a corporation having an office and place of business within this District and upon information and belief, the Libellant avers that it is incorporated under the Laws of the State of Delaware.

8. Atlantic Refining Company is a corporation that has an office and place of business within this District and upon information and belief, the Libellant avers that it is incorporated under the Laws of the State of Pennsylvania.

9. On or about November 18, 1952, the tug *Arthur M. Heron* and certain scows owned by the Libellant were proceeding down stream on the Schuylkill River at a point above the Penrose Ferry Bridge, within this district. As the flotilla was proceeding, the surface of the Schuylkill River suddenly burst into flames and as a result thereof, two members of the crew, Arthur E. Milan and Donald Worrell, lost their lives, several members of the crew of the tug sustained personal injuries, the tug *Arthur M. Heron* was seriously and severely damaged and the Libellant was deprived of the

use of the said tug that was necessary in conducting the normal business operations of the Libellant. The Libellant avers upon information and belief, that the fire up on the surface of the river was due to the accumulation upon the water of volatile petroleum or similar products which had been deposited thereon by reason of the negligence of one or more or all of the respondents herein.

10. On May 11, 1953, the Libellant American Dredging Co. filed a petition for exoneration from or limitation of liability in this court which action is docketed as No. 137 of 1953 in admiralty.

11. Thereafter the petition for limitation of liability proceeded to trial and on January 19, 1956, this Honorable Court (Kirkpatrick, J.) filed an opinion and on February 15, 1956 entered a final decree exonerating American Dredging Company from all liability. Thereafter that decision was appealed to the U. S. Court of Appeals for the Third Circuit and was affirmed in an opinion filed by that Court on July 5, 1956. Thereafter a petition for a Writ of Certiorari was filed in the Supreme Court of the United States and on February 3, 1958, the judgment exonerating American Dredging Company was reversed and the matter remanded to this Court for further proceedings consistent with the opinion of the Supreme Court.

12. Thereafter this honorable court conducted such further proceedings and entered judgment against American Dredging Company in the sum of $37,500.00 in favor of William J. Kernan, Administrator of the Estate of Arthur E. Milan, Deceased, and in the sum of $90,000.00 in favor of John J. Meehan, Administrator of the Estate of Donald M. Worrell, Deceased and American Dredging Company settled the claim of Francis J. Harrington for the sum of $1,750.00 and the claim of John W. McGinley for the sum of $750.00.

13. Thereafter American Dredging Company paid the judgment in favor of John J. Meehan, etc. and William J.

Kernan etc. has filed an appeal to the United States Court of Appeals for the Third Circuit Court from the judgment in his favor entered by this court, which appeal is still pending.

14. The respondents, Gulf, Standard, Atlantic Pipe Line, Atlantic Refining, American and Pioneer are all owners and occupiers of land along the banks of the Schuylkill River in the vicinity of the fire which caused the damage referred to herein.

15. The respondent, Texas, is the owner and operator of the tank vessel *Washington* which, at all times material hereto, was docked in the Schuylkill River and above the point of the fire at the plant of the respondent *Atlantic*. The Libellant is informed, believes and therefore avers, that the *Washington* was carrying petroleum products and that prior to its arrival at the port of Philadelphia, the *Washington* had been in collision at sea and had sustained damage.

16. The Libellant avers as to respondent *Texas* that it negligently permitted petroleum products to be deposited upon the surface of the Schuylkill River which petroleum products either alone or in combination with other petroleum or similar volatile products were floating upon the surface of the river and became ignited causing the damage, loss of lives and personal injuries herein before referred to.

17. As to the respondents Gulf, Standard, Atlantic Pipe Line, Atlantic Refining, American and Pioneer, the Libellant avers that they own various parcels of land along the Schuylkill River and in the vicinity of the said fire, upon which they conduct the refining, storage and transportation of petroleum products and that each of them was negligent in causing or permitting the escape of petroleum or similar volatile products and permitting them to be deposited upon the surface of the river where, alone or in combination with petroleum products deposited by others, there was formed

on the surface of the river an area of volatile materials which were ignited and caused the damage referred to herein.

18. The Libellant is advised, believes and therefore avers that each of the respondents was negligent in that after having initially been negligent in causing or permitting the volatile petroleum or similar products to escape and be deposited upon the surface of the river, they negligently failed to warn persons using the said river for the purpose of navigation of the grave danger which had been created by the deposit thereon of volatile materials when they and each of them knew or should have known that the river would be used for navigation and that the presence of the volatile materials constituted a grave danger and an unnecessary risk of harm to persons using the said river for purposes of navigation.

19. In addition to the damage to its tug, the loss of use thereof, the settlements it has made and the judgments which it has paid or which it may become liable to pay, the Libellant herein has paid and incurred large sums for investigation and defense of the claims which have been made against it by the persons injured on its tug and by the Administrators of the Estates of its two employes who were killed at the time of the said fire and who prosecuted claims against the Libellant under the Provisions of the Jones Act.

20. The Libellant has not been guilty of unnecessary delay in instituting the within action for the reason that even now the final amount of its loss has not been ascertained by reason of the pendency of the litigation herein referred to and the respondents have not been prejudiced by reason of any delay in that all respondents had knowledge of the fire at the time it occurred, the evidence is largely documentary and/or physical facts and the respondents Gulf, Texas and Standard were advised by notice to their underwriters in 1956 that if American Dredging Company

were held liable for the claims for death and personal injury, actions against them would be instituted by the Libellant herein.

WHEREFORE the Libellant prays that:

(a) Process in due form of law shall issue against the respondents and each of them citing them to appear and answer the allegations of this libel.

(b) That this honorable court shall enter judgment for the Libellant for the sum of $250,000 against the respondents or for such sum as this Honorable Court shall find may be due the Libellant by reason of the premises.

(c) That this Honorable Court shall grant such other and further relief as may seem just to it in the premises.

KRUSEN, EVANS & SHAW

By .....

Counsel for Libellant.

## APPENDIX B.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | |
|---|---|
| AMERICAN DREDGING CO., Libellant *against* GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY and HERMAN S. STOFFMAN and BENJAMIN STOFFMAN, Respondents. | No. 9 of 1959 in Admiralty |

### Exceptions to Libel.

The Texas Company, one of the respondents herein, hereby excepts to the libel herein upon the following grounds:

1. That the facts averred in the libel are not sufficient to constitute a cause of action.

2. That the facts averred in the libel do not constitute a cause of action within the Admiralty and Maritime jurisdiction of this court.

3. As alleged in articles 11 through 13 of the libel, libellant has already been found by the Supreme Court of the United States of America to have been negligent and liable for the damages alleged in the libel, accordingly the

libellant adjudicated *tort feasor* has no cause of action in admiralty for contribution or indemnity against the respondent, The Texas Company.

4. That the libellant's claim is barred by laches.

O'NEILL & RUSSELL,
PYNE, BRUSH, SMITH & MICHELSEN,

By: WILLIAM P. O'NEILL,
Proctors for Respondent
The Texas Company

IN THE

# Supreme Court of the United States

October Term, 1960.

## No. 565.

AMERICAN DREDGING COMPANY,

*Petitioner,*

*v.*

GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY and HERMAN S. STOFFMAN and BENJAMIN STOFFMAN,

*Respondents.*

## PETITIONER'S REPLY TO BRIEFS IN OPPOSITION.

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IN THE

# Supreme Court of the United States

October Term, 1960.

No. 565.

AMERICAN DREDGING COMPANY,
*Petitioner,*

*v.*

GULF OIL CORPORATION, STANDARD OIL COMPANY, ATLANTIC PIPE LINE COMPANY, AMERICAN OIL COMPANY, TEXAS COMPANY, ATLANTIC REFINING CO., PIONEER OIL COMPANY AND HERMAN S. STOFFMAN AND BENJAMIN STOFFMAN,
*Respondents.*

## PETITIONER'S REPLY TO BRIEFS IN OPPOSITION.

The various respondents urge this Court to deny certiorari, urging that the Petitioner did not point out conflict, that the facts of this case are *sui generis* and that an important federal question is not involved. Perhaps in an attempt to achieve brevity we telescoped our petition unduly.

### There Is Clear Conflict in the Following Respects.

1. All Circuits, including the Third, recognize Indemnity where the initial liability is imposed by the F. E. L. A. and all apply State law to the indemnity action. The decision below is in conflict since it affirmed a holding that because .

> "the obligation which libellant has satisfied . . . has been defined and imposed . . . solely as a federally created right under the Jones Act", the Petitioner's right to indemnity was "derived, if at all, from the same source." 175 F. Supp. 882 at 885 and Brief for Gulf Oil Corporation in Opposition, P. 6.

2. The Second Circuit and various District Courts have recognized the existence of the right of indemnity in the maritime field, sometimes granting and sometimes withholding it *based on the facts* of the individual case.

3. There are basic conflicts in result and rationale between the holding in the case at bar and decisions in other F. E. L. A. and maritime cases decided by the Third Circuit.

Perhaps some of the conflict may be best illustrated by a quotation from a decision of the Court of Appeals for the Third Circuit which was handed down the day after that Court filed its opinion sur rehearing in the case at bar.

*Kennedy v. Pennsylvania Railroad Company*, 282 F. 2d 705, was a suit against the employer under F. E. L. A. [46 U. S. C. A. 51] in which the defendant issued a third party complaint seeking indemnity from United States Steel Corporation for failure to properly maintain a crossing. A holding for the plaintiff was affirmed and in remanding the indemnity action the Court said:

> "[2] If there is no express agreement as to indemnity between Railroad [Defendant] and Steel [Third Party Defendant], and Kennedy [plaintiff] is found to have been contributorily negligent, Steel may plead his negligence as a bar to any recovery over by Railroad. See Ft. Worth & Denver R. Co. v. Threadgill, 5 Cir., 1955, 228 F. 2d 307, Panichella v. Pennsylvania R. R. Co., D. C. W. D. Pa. 1958, 167 F. Supp. 345, reversed on other grounds 3 Cir., 1959, 268 F. 2d 72; Flush v. Erie R. Co., D. C. N. J. 1953, 110 F. Supp. 118,

121; Lawrence v. Great Northern R. Co., D. C. Minn. 1951, 98 F. Supp. 746, affirmed sub nom. Waylander-Peterson Co. v. Great Northern R. Co., 8 Cir., 1953, 201 F. 2d 408, 414-15, 37 A. L. R. 2d 1399; Wallace v. New Orleans Public Belt R. Co., D. C. E. D. Iowa 1948, 78 F. Supp. 724, reversed on other grounds, New Orleans Public Belt R. Co. v. Wallace, 5 Cir., 1949, 173 F. 2d 145. *See also analogous Jones Act cases: Spaulding v. Parry Navigation Co.*, 2 Cir., 1951, 187 F. 2d 257, 261; *Pabellon v. Grace Line, Inc.*, D. C. S. D. N. Y. 1951, 12 F. R. D. 123; *Ginsburg v. Standard Oil Co. of New Jersey*, D. C. S. D. N. Y. 1945, 5 F. R. D. 48. The main action between Kennedy and Railroad is governed by the F. E. L. A. where the doctrine of comparative negligence is applied. In the third party action, the law of Pennsylvania applies under which even the slightest degree of contributory negligence will defeat a claim. Middleton v. Glenn, 1958, 393 Pa. 360, 143 A. 2d 14. It is apparent that the area of liability under the federal act is much more broad than under the state law." 282 F. 2d 705 at 708-709. (Italics ours.)

In other words, the Third Circuit recognizes the right to indemnity in F. E. L. A. cases and even points to analogous cases under the Jones Act but, because of a misapplication of this Court's prior decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation*, 342 U. S. 282, it reached a result in the case at bar which is in conflict with a host of indemnity cases where the original liability was imposed under both the F. E. L. A. and the Jones Act.

In the above quotation the Court of Appeals refers only to the District Court's decision in *Pabellon v. Grace Line, Inc.*, but neglects to point out *Pabellon* was later decided by the Court of Appeals for the Second Circuit, 191 F. 2d 168, and that this Court denied certiorari sub nom. *Coston Supply Co. v. Pabellon*, 342 U. S. 893. In *Pabellon* the Court of Appeals for the Second Circuit reversed the

District Court which had held that the complaints for indemnity would not lie where the plaintiff's initial complaint was based upon the Jones Act [46 U. S. C. A. 688].

The decisions in *Spaulding v. Parry Navigation Co.*, 187 F. 2d 257 and *Slattery v. Marra Brothers, Inc.*, 186 F. 2d 134, are clearly in conflict with the decision which this Court is now asked to review. In *Spaulding* the Second Circuit looked to New York law and held that *under the facts* indemnity would not lie. In *Slattery* it looked to New Jersey law. Indemnity was again denied on the facts, but the right to indemnity in a proper, non-contract factual situation is implicit in both decisions. Pennsylvania, where the actionable facts of this case occurred, just as clearly does recognize indemnity. *Builders Supply Co. v. McCabe*, 366 Pa. 322 and other cases cited in the Petition.

This conflict, taken in conjunction with the fact that the indemnity here sought is almost entirely for damages paid by reason of the death of two of Petitioner's employees [*Kernan, Adm. v. American Dredging Company*, 355 U. S. 426], plus the *Romero*,[1] *Hess*[2] and *Tungus*,[3] line of cases, cited at page 13 of the Petition, gives additional force to the Petitioner's argument that in cases such as this the Federal Courts should look to State law to determine whether an employer held liable under the Jones Act may, in a proper factual situation, obtain indemnity. Certainly that is the universal holding when similar situations have arisen under F. E. L. A. and where the same question has arisen in other Circuits under the Jones Act.

The Third Circuit decision in the case at bar is likewise in direct conflict to its own earlier decision in *Jones v. Waterman Steamship Corporation v. Reading Company*, 155 F. 2d 992. See Gilmore and Black, *The Law of Admiralty*, 271 et seq. where, at page 276, the following appears:

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1. *Romero v. International Terminal Operating Co.*, 358 U. S. 354.

2. *Hess v. United States*, 361 U. S. 314.

3. *M/V Tungus v. Skovgaard*, 358 U. S. 588.

"It is unfortunate that so relatively simple a situation has become enmeshed in technicalities and that the shipowner's right to indemnity cannot be decided without learned discussion of common law forms of action and the pleading *quod servitium amisit*. The equities are clearly with the shipowner. The tortfeasor, if he is required to indemnify the shipowner, is not being made to pay anything which (assuming his negligence) could not have been recovered from him directly in a tort action. The cases are in accord that if the seaman first recovers medical expenses from the tortfeasor, the shipowner gets a credit if he is subsequently sued for maintenance and cure. If so much is recognized, it seems unduly technical to forbid the indemnity when the seaman proceeds in reverse chronological order and first collects his maintenance and cure from the shipowner. Furthermore, if the seaman joins both shipowner and tortfeasor as defendants, the cases hold without exception that the maintenance and cure items in any judgment are to be collected in the first instance from the tortfeasor."

If the shipowner has a right of action for indemnity to recover the sums paid under the doctrine of maintenance and cure, it is a distinction without a difference to say he should not recover the sums he has paid as damages.

**Only the Facts of the Present Case Are Unique. The Legal Principle Forming the Basis of the Decision Below Has Particularly Wide Application in the Maritime Field.**

The field of indemnity is probably the most rapidly developing one in tort law.[4] The growth of indemnity is so

4. A rough idea can be obtained from the fact that the 1952-1957 five year digest volume of American Maritime cases requires 14 pages to digest the indemnity decisions during that period, whereas the preceding volume covering the five years prior to 1952 requires about one-quarter of a page.

recent that it is not strange that the problems encompassed within the present case have not reached this Court earlier. There are, however, a large number of cases awaiting decision.

This Court's decision in *Boudoin v. Lykes Brothers SS Co.*, 348 U. S. 336, has led to actions for indemnity in assault cases. *Thompson v. American Export Line, Inc.*, 15 F. R. D. 125. Injury cases involving cargo stacked on piers have resulted in indemnity claims which could not possibly be on a contract basis. *Tarantino v. Buck v. Isthmian SS Co.*, 1957 A. M. C. 797.[5] Auto and other accidents to seamen ashore have given rise to claims for indemnity which have been judicially recognized where no contract could have existed between Indemnitor and Indemnitee.

**There Is Need for Clarification of the Interplay Between This Court's Decision in Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation and Kernan, Adm. v. American Dredging Company.**

There is a fundamental difference between indemnity and contribution which is either ignored or misunderstood by those who refer to indemnity as "nothing but 100% contribution" [Page 7—Brief of Gulf Oil Corporation in Opposition]. As the Court of Appeals for the Third Circuit has itself said on another occasion:

> "The cases since Halcyon have recognized the difference between claims for contribution and for indemnity and have held that Halcyon bars only the former." [Citing cases.]
>
> *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784 at 793.

One of the cases cited by the Court in *Crawford v. Pope and Talbot, Inc.* contains the following language:

5. Not officially reported.

"Both the common law and admiralty courts have recognized a right of indemnity, as distinguished from contribution, in a person who has responded in damages for a loss caused by a wrong of another."

*Davis v. American President Line*, 106 F. Supp. 729 at 730.

In a field where, by reason of the liability imposed by the Jones Act, an employer-shipowner has the obligation to provide medical care with the resultant possibility of aggravating injury through malpractice,[6] to respond in damages for the acts of dockowners,[7] and is a warrantor of equipment supplied by others,[8] it is of particular importance that this Court delineate the distinctions between contribution and indemnity in the field of maritime law.

*Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, supra*, did not purport to control indemnity but only contribution. This is evident from this Court's later decisions in *Ryan*,[9] *Weyerhaeuser*,[10] *Crumady* [11] and *Water-*

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6. Compare *Fisher v. Milwaukee Electric Ry. & Light Co.*, 173 Wis. 57, 180 N. W. 269 with *Fainland v. Trinidad Corporation v. United States*, C. A. 23997, U. S. D. C. E. D. Pa.; *Sutherland v. Moore-McCormack Lines, Inc. and United States, Somberg and Urban*, C. A. 128,379, U. S. D. C. S. D. N. Y.; *Young v. Sinclair Refining Company*, C. A. 28910, U. S. D. C. E. D. Pa..

7. *Davis v. American President Line*, 106 F. Supp. 729; *Jones v. Waterman Steamship Corporation v. Reading Company, supra; Waldoff v. A/S J. Ludwig Mowinckels Rederii*, C. A. 27683, U. S. D. C. E. D. Pa.; *Svitak v. A/S J. Ludwig Mowinckels Rederii*, C. A. 27678, U. S. D. C. E. D. Pa.

8. *Pabellon v. Grace Line, Inc., supra, Alaska Steamship Co. v. Petterson*, 205 F. 2d 478, affirmed per curiam 347 U. S. 396 and the numerous cases which have followed it.

9. *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corporation*, 350 U. S. 124.

10. *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563.

11. *Crumady v. Joachim Hendrik Fisser*, 358 U. S. 423.

*man.*[12] These decisions do not cover the entire field of indemnity, but only the cases where the prospective indemnitor is an employer subject to a Compensation Act containing an "exclusive liability" provision.

Unless the decision below is reviewed, the Third Circuit will have rewritten the entire law of indemnity and rewritten, as well, the familiar line so that it would become

"one if by land, none if by sea".

Certiorari should be granted and the judgment reversed.

Respectfully submitted,

T. E. Byrne, Jr.,
John J. Guilfoyle, Jr.,
Krusen, Evans and Shaw,
*Counsel for Petitioner.*

12. *Waterman S. S. Corp. v. Dugan & McNamara, Inc.*, 81 S. Ct. 200, — U. S. —.

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FILED
FEB 10 1961
JAMES R. BROWNING, Clerk

IN THE

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October Term, 1960.

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AMERICAN DREDGING COMPANY,
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*Respondents.*

# PETITION FOR REHEARING.

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*Respondents.*

## PETITION FOR REHEARING.

This petition is filed to urge that this Honorable Court may reconsider its order entered January 16th, 1961 denying the petition for a Writ of Certiorari in the above captioned matter. This case is the natural follow up of this Court's decision in *Kernan v. American Dredging Company*, 355 U. S. 426. On the present posture of the pleadings we take it that the courts must accept as a factual basis the proposition that Gulf negligently deposited gasoline on the surface of the river and that the gasoline was ignited by a lantern on American Dredging Company's tug which was lawfully navigating the river. American, not being a joint tortfeasor with Gulf, claimed full indemnity [as opposed to contribution] for all the loss American had

sustained as a result of the fire which took two lives and damaged the tug.

The ultimate result of the litigation as it now stands is that American does not state a cause of action for the judgments it had to satisfy as the employer held liable to the estates of deceased employees under the Jones Act, *Kernan v. American Dredging Company, supra,* but it does state a cause of action for damage to its tug.

In support of the petition for rehearing, the petitioner will press the following points:

1. The question presented by the petition for certiorari is of far reaching importance in the field of maritime law.

2. There is conflict and confusion among the inferior Federal courts, in spite of the assertion in the briefs in opposition that there is not conflict.

3. It would appear that the petitioner's reply to the briefs in opposition was filed so close to the decision date that opportunity to consider the reply was at least minimal.

## I. The Question Presented by the Petition for Certiorari Is of Far Reaching Importance in the Field of Maritime Law.

The multiple briefs in opposition to the petition all played down the importance of the question which the present case presented. This court's refusal to hear and consider the issue of the extent of the right of Indemnity in the field of maritime law can only serve to compound the confusion presently existing in the field of maritime law. To add to the confusion, the result of refusal of certiorari here boils down to this. A railroad company held liable under the Federal Employers Liability Act, 45 U. S. C. A. 51, has its right of indemnification, given the appropriate factual situation. Even though the Jones Act, 46 U. S. C. A.

688 does nothing more nor less than incorporate the F. E. L. A. into the shipowner-crew member relationship, nevertheless the decision below in the case at bar highlights the completely different result where an action for indemnification is brought against a negligent third-party tortfeasor by a Jones Act Employer. Thus under the same statutory provisions, the ultimate result of risk-shifting under identical statutes is made to depend upon the distinction between actionable facts occurring upon land and the identical actionable facts occurring upon navigable waters. We respectfully suggest that such a distinction is arbitrary, meaningless and groundless. This decision is one which cries out for the aid, assistance and guidance of the country's court of ultimate resort. Without it, lower courts have reached a decision which assures unequal protection of the law—a railroad could recover, a maritime employer may not.

We again call the attention of this Court to the fact that the dismissal of that portion of the petitioner's libel which sought indemnification for the sums paid in satisfaction of judgments entered in death actions was entered before an iota of testimony had been placed upon the record. For all that this Court can now know, that record may turn out to show not mere negligent conduct, but conduct which might well be labeled wilful. It might be one thing to have Lower Courts dismiss and this Court refused to review the dismissal after the presentation of evidence. But in the case at bar the two Lower Courts have, in effect, held that it does not matter to what degree the evidence may show reprehensible conduct upon the part of Gulf, American does not state a cause of action for restitution or indemnity, although the same pleading states a cause of action for property damage.

The result which the courts below have reached can be rationalized if, but only if, one or more of the following hypotheses will stand logical analysis. We submit that none of them will.

**Hypothesis A. The maritime law does not *permit* Restitution or indemnity, no matter what the facts may be, unless there is a contractual basis for it.**

*Comment:* A rule such as this would divorce the whole field of equitable Restitution from the maritime law which has, by tradition, been based upon principles of equity. This Court has in the past recognized the distinction between contribution sought by one joint tortfeasor against another and Restitution or indemnity sought by one secondarily liable against another primarily liable. Compare *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 350 U. S. 124 at 133 with *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316, and *Union Stockyards Company of Omaha v. Chicago Burlington and Quincy Railroad*, 196 U. S. 217.

**Hypothesis B. There is no distinction between Restitution or indemnification by payment of an entire loss and contribution, or the recovery of a pro-rata share of the loss from another.**

*Comment:* In *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation*, 342 U. S. 282, this Court distinguished between those two and enunciated a rule applicable to claims for *contribution only* brought by one tortfeasor against his joint tortfeasor. At least without full exploration of the problem by this Court, the rule of *Halcyon* should not be permitted to be expanded by Lower Courts to encompass the field of indemnification.

As *Halcyon* reached this Court, it was a claim by one admitted tortfeasor to recover a pro rata share of the judgment it had paid from another whom it alleged was a joint tortfeasor with it. Halcyon was certainly not an attempt by a party who had been held secondarily liable to recoup its entire loss from a party who was allegedly primarily liable.

Hypothesis C: There is (or should be) a distinction drawn in the field of equitable Restitution based solely on the distinctions between property damage on the one hand and injury and death claims on the other.

*Comment:* After losses have, by payment of judgments or repair bills been reduced to the common denominator of money, there is no legitimate distinction between the parts which go to make up the whole: More to the point, there is no longer any legitimate distinction which the tortfeasor causing both types of loss may legitimately invoke as a sort of "Grandfather clause" to shield himself from liability for tort. American's claim against Gulf for a sum certain in money is not legitimately separable at this stage of the proceeding so that part is and part is not tainted.

## II. There Is Conflict and Confusion Among the Inferior Federal Courts, in Spite of the Assertion in the Briefs in Opposition That There Is Not Conflict.

One of the points asserted in the briefs in opposition is the absence of conflict. That claim will not stand analysis.

In *Davis v. American President Lines*[1] one of the District Courts has said, "Both the common law and admiralty courts have recognized a right to indemnity, as distinguished from contribution, in a person who has responded in damages for a loss caused by a wrong of another. This right has been recognized in two general classes of cases: those in which the person asking indemnity was without fault, and those in which such person was passively negligent, but the primary cause of the loss was the active negligence of another". 106 F. Supp. 729 at 730.

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1. 106 F. Supp. 729.

In *Horan v. Pope and Talbot*,[2] another District Judge points out that while this court's decision in *Halcyon v. Haenn* forbids contribution between joint tortfeasor, " . . . it does not necessarily follow, however, that such holding forecloses the right of a party held responsible to be indemnified by another party if warranted by the facts of a particular case. For example, a party is entitled to indemnity if the facts show it committed a passive tort and another committed an active tort". The District Court in Horan cites *Standard Oil Co. v. Robins Dry Dock & Repair Co.*,[3] *Petition of L. Boyers' Sons Co.*,[4] *Seaboard Stevedoring Co. v. Sagadahoc SS Co.*[5]

In *Rich v. United States*,[6] the second circuit adopts the rule of *West Chester Lighting Company v. West Chester County Small Estates Corp.*,[7] and holds that a suit for indemnity will lie "for the breach of an independent duty owing".

Other cases pointing out conflict were cited in the petitioner's reply heretofore filed. The best evidence of conflict and confusion in this branch of Maritime Law, however, seems to be evidenced by the following sequence.

The Third Circuit denies indemnity [*Longshoreman-shipowner-Stevedore* case] upon the ground this is no contract upon which to base indemnity. *King v. Waterman v. Dugan & McNamara, Inc.*[8] This court grants certiorari in Waterman. While argument was pending in Waterman, the Third circuit decided the present case and the *only* citation of authority for its decision was its decision in *King v. Waterman v. Dugan McNamara* [Petition 8a]. Thereafter this court reversed the Third Circuit's single authority—

2. 115 F. Supp. 32.
3. 32 F. (2) 182.
4. 25 F. (2) 602.
5. 32 F. (2) 886.
6. 177 F. (2) 688.
7. 278 N. Y. 177; 15 N. E. (2) 567.
8. 272 F. (2) 823.

*Waterman SS Co. v. Dugan & McNamara, Inc.*[9] When this court denied certiorari in the present case on January 16, 1961, we suspect the Third circuit was as surprised as was Petitioner's counsel.

In *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*[10] this court stated that it did not reach the issue of whether, in a suit by shipowner versus Stevedore for indemnity, there had to be "reliance upon an indemnity or service agreement". *Ryan v. Pan-Atlantic, supra* fn. 6. It so stated even where there was an employer-employee relationship of plaintiff longshoreman to stevedore and hence the interplay of the Longshoremen's Compensation Act. There can be no basis for stating that because this court chose to base *Ryan* and its decedents upon contract, there can not be another foundation upon which a claim for indemnity can be supported.

We think it not amiss to suggest that this case presents an opportunity for the court to reappraise the result it reached in *Halcyon v. Haenn*, and to modify it at least in the situation where, as here, to do so would be consonant with State law. This Court should enunciate Federal law or adopt State law to fill the void. To do so would be entirely compatible with the line of cases beginning with Ryan, of which *Waterman v. Dugan & McNamara* is the latest development. Similarity of reasoning and approach is evident as between the dissenting opinion in *Ryan* and the opinion of the Court in *Halcyon*. The soundness of *Halcyon* has frequently been questioned.[11] Here again law is being made by refusing to make law. More grievous than that, however, is making law by refusing to permit clearly established State Law to operate, and this in spite of *Tungus*,[12] *Hess*[13] and similar cases. See Petition for

9. — U. S. —; 29 L. W. 4035.
10. 350 U. S. 124.
11. Hart & Sacks: The Legal Process: Basic Problems in the Making and Application of Law, 515; 541.
12. *M/V Tungus v. Skovgaard*, 358 U. S. 508.
13. *Hess v. United States*, 361 U. S. 314.

certiorari, P. 13 "Reversing Halcyon would not be too drastic a step * * *".[14] A State court has applied New Jersey's contribution statute in a maritime case, distinguishing *Halcyon* upon the ground that no employment relationship was there involved.[15] Of course we reiterate our statement in our Petition for certiorari that neither the employment relation nor the Jones Act touch the relationship of American and Gulf.

**III. The Third Proposition We Consider Fallacious Is the Preservation of a Distinction Which No Longer Exists as Between American and Gulf. The Court Below Has Resurrected a Sort of "Grandfather Clause" and, in Effect, Has Said: "For a Part of American's Claim We Will Recognize a Right of Recovery Because It Did Not Have Its Origin in Loss Due to Death or Injury; the Balance We Will Not".**

But this is litigation by American versus Gulf. If Gulf negligently caused loss to American, is it not a useless and artificial distinction to separate one bundle of loss into two parts, based upon ancestry? Since American's claim is *not* a claim for injury or death but at this stage of the proceedings merely a part of one whole, what logic continues to separate the parts. Surely if Gulf was negligent, the personal representatives who recovered against American could likewise recover against Gulf.[16] Compare Gilmore and Black, The Law of Admiralty P. 276 "The tortfeasor, if he is required to indemnify the shipowner, is not being made to pay anything which (assuming his negligence) could not have been recovered from him directly in a tort action". Should the fortuitous fact that Kernan's

14. White: A New Look at the Shipowner's Right-over for Shipboard Injuries—12 Stanford L. R. 717 at 730.

15. *Frueh v. Kupper*, 54 N. J. Super. 296.

16. *Kernan, Admr. v. Gulf Oil Corp* is in fact now on the trial list in the Eastern District of Penna.

case against American came to trial [non-jury] before his suit against Gulf [jury] bring about a different result even before the facts as against Gulf are in evidence?

More fundamental, however, is the fact that the claim *now* presented is for a sum certain, i.e., property. Heretofore where property rights have been involved this court has looked to state law where federal law is incomplete and interstitial. *Madruga v. Superior Court.*[17] See also *Crapo v. Kelly.*[18] Thus a rule of law which has been recognized for at least 89 years is permitted to be upset by a decision by an inferior court *sub silentio.*

## CONCLUSION.

If the decisions below are to be the law, surely they should have a sounder basis of legal authority than *King v. Waterman v. Dugan & McNamara,*[19] which this court has since reversed. Is this not a case in which this court should "take[s] a more active view of its responsibilities in developing a rational common law of the sea," * * * and "pay[s] more attention to relevant state and federal interests and to consistency between decisions" so that "it may escape the tangle and seaweed which has long obstructed the development of this branch of the law".[20]

Whether Gulf escapes payment for the loss its negligence foisted upon American is not, *per se*, of transcending importance. What is of transcending importance is that there shall not arise by inaction "a precedent which puts in question the continued vitality in the federal courts of the whole Anglo-American tradition of growth of decisional law".[21]

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17. 346 U. S. 556.

18. 16 Wall. 610.

19. 272 F. (2) 823.

20. Currie: Federalism and the Admiralty: "The Devil's Own Mess", 1960 The Supreme Court Review, 158 at 221—Univ. of Chicago Press.

21. Hart & Sacks, *supra* fn. 11 at P. 535.

If *Halcyon* really calls for the result which the court below has reached [and we insist that it does not], should not this court re-examine *Halcyon?* This is particularly true in view of the development, since *Halcyon,* of the *Ryan* line of cases. If, as has been suggested,[22] "the unexpressed reasoning behind the *Halcyon* opinion may be found in the dissenting opinion in" *Ryan,* should not this court determine whether there is another path more in keeping with developments in the law which have taken place since Halcyon was decided, for it is almost inconceivable that it would be decided the same way today.

The question is important. There are many cases now pending [Petitioner's reply to briefs in opposition, P. 7 fn. 6] in one District alone.[23] Undoubtedly there are more in other Districts, where the result would be incongruous if Indemnity is to be denied under all circumstances (absent a contract) in the Maritime field.

Re-hearing should be granted, the order denying certiorari should be vacated and the Petition for certiorari should be granted.

Respectfully submitted,

T. E. Byrne, Jr.,
Krusen, Evans & Shaw,
*Counsel for Petitioner.*

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22. Currie—*supra* fn. 20 at P. 213.

23. Chiefly actions under the Jones Act coupled with alleged malpractice by the U. S. Public Health Service.

I hereby certify that the within Petition is presented in good faith and not for delay.

T. E. Byrne, Jr.